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RECORD, CASE No. 13,606.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 68.

HENRY SUESSENBACH, HUGH McCAFFREY, DANIEL McLAUGHLIN, AND WILLIAM R. STEELE, APPELLANTS,

vs.

THE FIRST NATIONAL BANK OF DEADWOOD, DAKOTA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

FILED AUGUST 16, 1889.

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INDEX.

	Original.	Print.
Transcript from district court	1	1
Complaint	1	1
Amended answer	3	2
Reply	20	12
Bill of exceptions	22	13
Exhibit A—United States patent to Suessenbach *et al.*, February 15, 1882	23	14
B—Deed, Sutherland to McCaffrey and Suessenbach, July 6, 1878	30	16
C—Power of attorney, Lydia A. Welch to Frank Welch, May 1, 1878	33	18
D—Power of attorney, Mary Welch *et al.* to Frank Welch, May 1, 1878	35	19
E—Deed, Frank Welch *et al.* to Suessenbach, August 1, 1882	39	21
F—Deed, Suessenbach and McCaffrey to McLaughlin and Steele, August 10, 1882	43	23

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 20, 1892.

	Original.	Print.
Testimony of Peter L. Rogers	48	26
Hugh McCaffrey	49	26
Henry Suessenbach	49	27
Frank Welch	50	27
William L. Hamilton	52	28
Edwin Van Cise	52	29
Donald A. McPherson	53	29
Alvin Fox	53	29
John A. Gaston	54	30
Exhibit G—Certified copy of proceedings in General Land Office under which plaintiffs' patent was acquired	56	30
Certificate	56	30
Amended certificate of location	57	31
Abstract of title	59	33
Application for patent	62	34
Proof of publication	65	35
Notice of application	66	36
Proof of posting notice and diagram on claim	68	37
Proof that plat and notice remained posted on claim	71	39
Register's certificate of posting	72	39
Notice of application	73	40
Statement of fees and charges	75	41
Affidavit of $500 improvements	76	41
Proof that no known vein exists	77	42
Certificate that no suit is pending	79	42
Affidavits of citizenship	80	43
Letters of administration	84	45
Field-notes, &c.	86	46
Application to purchase	94	49
Register's final certificate	96	50
Receiver's receipt	98	50
Protest of J. A. Nye *et al.*	99	51
Notice of application	101	52
Testimony of Louis F. Hildebrand	105	54
Copy of laws drawn up and adopted by the miners of Whitewood district in meeting on discovery claim, April 6, 1876	107	55
Notice of relocation, March 16, 1877	109	56
Deed, Moore *et al.* to Sutherland *et al.*, April 13, 1877	112	58
Deed, J. J. Sutherland to F. T. Sutherland, July 25, 1877	113	58
Testimony of Noah Seiver	114	59
Exhibit H—Deed, Seiver *et al.* to Stebbins *et al.*, March 26, 1877	119	62
I—Deed, Seiver *et al.* to Stebbins *et al.*, March 27, 1877	122	63
Testimony of Samuel N. Wood	131	69
W. R. Stebbins	133	70
Donald McPherson	135	71
Exhibit K—Deed, Stebbins to First National Bank, August 10, 1878	135	71

	Original.	Print.
Testimony of Donald McPherson (recalled)	139	72
L. C. Miller	142	75
Noah Seiver (recalled)	144	75
William Selbie	144	76
E. C. Bent	145	76
James J. Sutherland	147	78
Alvin Fox	148	78
Noah Seiver (recalled)	149	79
Findings of fact	153	80
Conclusions of law	167	88
Motion to correct findings and conclusions	170	90
Motion for new trial	187	101
Notice of motion for new trial	202	109
Notice of application to settle bill of exceptions	202*a*	110
Judge's certificate to bill of exceptions	202*b*	110
Order overruling motion for new trial	203	111
Judgment	204	111
Notice of appeal	208	113
Bond on appeal	210	114
Amended answer	213	115
Demurrer to amended answer	226	123
Order sustaining demurrer, &c.	228	124
Order as to use of copies of papers on appeal	229	124
Judge's certificate as to record on appeal	230	125
Clerk's certificate to record	231	125
Judge's certificate to clerk's signature	232	126
Assignment of errors	233	126
Judgment	240	131
Reasons for judgment	242	132
Notice of appeal and allowance of same	243	132
Bond on appeal	244	133
Citation (copy)	249	135
Journal entries	250	135
Opinion	252	137
Stipulation as to costs	259	150
Clerk's certificate	260	150
Citation (original)	261	151
Proof of service of citation	262	151

1 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

In District Court, First Judicial District.

HENRY SUESSENBACH, HUGH MCCAFFREY, DANIEL MCLAUGHLIN, and WILLIAM R. STEELE, Plaintiffs,
vs.
FIRST NATIONAL BANK OF DEADWOOD.

Complaint.

Now come the above-named plaintiffs, Henry Suessenbach, Hugh McCaffrey, Daniel McLaughlin, and William R. Steele, and, complaining of the above-named defendant, The First National Bank of Deadwood, state the following facts constituting their cause of action:

1. That the plaintiffs now are and have been since May 8th, A. D. 1878, the owners and seized in fee of, that certain piece or parcel of land situate, lying, and being on Main street, in the city of Deadwood and county of Lawrence and Territory of Dakota, and more particularly described as follows, to wit: Commencing at the northeast corner of Main and Lee streets, thence running in a northeasterly direction along the line of said Main street 21.5 feet; thence at right angles to said Main street in a northwesterly direction 100 feet; thence in a southwesterly direction and parallel with said Main street 21.5 feet; thence in a southeasterly direction at right angles to said Main street 100 feet to place of beginning, being lot No. 2, in block No. 3, and a part of mineral claim No. 86, as patented by the United States.

2 2. That the said defendant is in possession thereof and with-olds, and has since said 8th day of May, A. D. 1878, withheld, the possession of the same from these plaintiffs, to their damage in the sum of two thousand dollars.

Wherefore plaintiff- demands judgment—

1. For the possession of the said premises.

2. For two thousand dollars, the plaintiffs' damages by the withholding of the same, together with their costs.

McLAUGHLIN & STEELE,
Att'ys for Plaintiffs.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Daniel McLaughlin, being first duly sworn, makes oath and says that he is one of the plaintiffs named in the above-entitled cause; that he has heard read the foregoing complaint, knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

DANIEL McLAUGHLIN.

Subscribed and sworn to before me this 19th day of June, A. D. 1883.

JAMES S. MULLALY,
[SEAL.] *Notary Public.*

In dist. court. Henry Suessenbach *et al. vs.* First National Bank of Deadwood. Sum'ns & compl't. Filed September 3rd, 1883. A. R. Z. Dawson, clerk. McLaughlin & Steele, att'ys for pl'ffs.

3 In the District Court of the First Judicial District, Dakota Territory, in and for Lawrence County.

HENRY SUESSENBACH *et al.*, Plaintiffs,
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, Defendant.

The defendant, by leave of court, makes this its further amended answer to the complaint herein, and says—

I.

It denies each and every allegation in said complaint except as hereinafter admitted.

II.

It admits it is in possession of the real property and premises described in the complaint.

III.

Further answering said complaint, this defendant alleges that on the 8th day of May, 1878, the plaintiffs Daniel McLaughlin and William R. Steele were not the owners nor seized in fee of the real property described in the complaint nor of any part thereof, nor did they have any right, title, interest, or estate therein; and upon information and belief that the said Daniel McLaughlin and William R. Steele did not gain or acquire their pretended title thereto until on or about the 10th day of August, 1882, when a deed was executed to them by Henry Suessenbach and Hugh McCaffrey, purporting to convey them an undivided one-fourth interest in and to the real property described in the complaint, with other property, said Suessenbach and McCaffrey claiming to be the owners thereof under and by virtue of certain proceedings had by
4 them, as hereinafter more fully detailed, and an entry and purchase of the property by them in the manner and under the circumstances hereinafter shown; but that at the date of execution and delivery of such deed by said Suessenbach and McCaffrey to said McLaughlin and Steele the defendant was in the actual possession of the said real property described in the plaintiffs' complaint and of each and every part thereof, claiming under a title adverse to that of said Suessenbach and McCaffrey, to wit, under a title derived through a regular series of conveyances from Noah Siever, Edward Durham, William Moore, and Thomas Clifton, the

owners of the real property aforesaid, as is more fully and particularly hereinafter shown in this answer.

The defendant alleges that by reason of such actual possession of the defendant at the date aforesaid, claiming title adversely to that of said McLaughlin and Steele's grantors, Henry Suessenbach and Hugh McCaffrey, said grant and deed of conveyance so made and delivered by said Suessenbach and McCaffrey to said McLaughlin and Steele was and is void, and the said Daniel McLaughlin and William R. Steele have no right to bring or maintain this action.

IV.

Further answering said complaint, and as a further defense thereto, that on the 8th day of May, 1878, the plaintiffs Henry Suessenbach and Hugh McCaffrey were not the owners nor seized in fee of the real property described in the complaint, nor did they have any right, title, interest, or estate therein.

Upon information and belief that prior to that time, to wit, on or about Jan'y 5th, 1878, said plaintiffs, Suessenbach and McCaffrey, obtained a pretended grant or deed of conveyance from one H. F. Lake for an undivided one-third interest in certain real property, purporting to include that described in the complaint; but that at the time of the execution and delivery of such grant and deed C. Hoffman and William R. Stebbins, grantors of this defendant, were in actual possession of the said real property described in the complaint and of every part thereof, claiming under a title adverse to that of H. F. Lake, to wit, under a title derived from Noah Siever, Edward Durham, William Moore, and Thomas Clifton, owners of the real property aforesaid. Upon information and belief that on or about July 6th, 1878, the plaintiff Hugh McCaffrey obtained a pretended grant or deed of conveyance from one F. T. Sutherland for an undivided one-third interest in certain real property, including that described in the complaint; but that at the time of the execution and delivery of said pretended grant and deed the said C. Hoffman and William R. Stebbins, grantors of this defendant, were in actual possession of said real property and every part thereof, claiming under a title adverse to that of said Sutherland, to wit, under a title derived from Noah Siever and others as aforesaid.

Upon information and belief that said plaintiffs Suessenbach claim some further title in said real property by virtue of a pretended grant or deed from Frank Welch and others, heirs-at-law of Edward Welsh, deceased, of date August 5th, 1882, and purporting to convey to said Suessenbach an undivided one-third interest in certain real property, including that described in the complaint; but that at the time of the execution and delivery of such grant and deed this defendant was in actual possession of said real property and every part thereof, claiming under a title adverse to that of said Frank Welsh and other heirs of Edward Welsh, deceased, to wit, under a title derived through regular series of conveyances from Noah Siever, Edward Durham, William Moore, and Thomas Clifton, owners of the real property aforesaid.

The sources and history of the title so derived by this defendant are hereinafter more fully shown and set up, reference whereto is now made the same as if the facts there pleaded and set forth were here in this plea fully detailed.

Defendant alleges that the said several pretended grants constitute the title under which plaintiffs claim, but that by reason of such actual possession of defendant's grantors at the date first aforesaid and the actual possession of defendant at the date last aforesaid, claiming adversely as aforesaid to said plaintiffs' grantors, the said several grants and deeds of conveyance so made and delivered to said plaintiffs Suessenbach and McCaffrey were and are void, and said plaintiffs have no right to bring or maintain this action.

V.

Further answering said complaint and as a defense thereto, this defendant alleges upon information and belief that on the 16th day of March, 1877, the real property hereinafter described was a part of the unappropriated public domain of the United States and a part and portion of the land valuable for minerals, containing valuable mineral deposits; and thereupon Noah Siever, Edward Durham, William Moore, and Thomas Clifton, being citizens of the United States, entered upon and explored the same and duly occupied, located, and appropriated the same as placer mining ground, the same being valuable as placers, by due and proper compliance with the laws of the United States and of the Territory of Dakota and in accordance with the local laws, customs, and rules of miners in Whitewood mining district; that the land so located and appropriated by the said Noah Siever and his associates was known and described as placer claim No. 15, above discovery, on Whitewood gulch, in Whitewood mining district, Lawrence county,
7 Dakota Territory; that thereupon and by virtue of such location and appropriation the said Noah Siever and his associates aforesaid became the owners of said land and entitled to the possession thereof, and that thereafter they continued the owners in possession thereof, complying with all the laws, rules, regulations, and customs aforesaid and doing the necessary annual work thereon, and thereby became and were entitled to keep and maintain their possession and became and were owners of said real property; that being so the owners, in possession and entitled to the possession thereof, said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, on or about the 28th day of March, 1877, granted and conveyed, by a proper instrument, purporting to grant the same in fee simple, that portion of placer claim No. 15 aforesaid, described as "lot No. 2 A," on the corner of Lee and Main streets, Deadwood, being the same property described in the complaint to C. Hoffman and W. R. Stebbins.

Thereafter, to wit, on or about the 20th day of April, 1877, said Noah Siever and Edward Durham, having segregated from their associates aforesaid their interest in said placer claim No. 15, became the owners of the south ½ thereof, which includes the property in controversy, and admitted to some interest therein Thomas A. Ham-

ilton and H. J. Scott. The said Siever, Durham, Hamilton, and Scott delivered a further deed of conveyance, granting and conveying in fee simple the property above described, with full covenants of title, to the said C. Hoffman and W. R. Stebbins, from whom, by a regular series of conveyances, title to said property has come to this defendant; that the title of plaintiffs purports to be based on a purchase made by their grantors from the aforesaid owners of placer claim No. 15, Noah Siever, Edward Durham, William Moore, and
8 Thomas Clifton, but that said pretended purchase was made with full notice and knowledge of the title then standing in defendants' grantors as aforesaid and while they were in actual possession claiming adversely thereunder; that the said plaintiffs so purchasing of the said locators and owners assumed to purchase the whole of placer claim No. 15 aforesaid, including the ground described in the complaint, theretofore sold to this defendant as aforesaid, but that at the time of their purchase they contracted and agreed with the said locators, as a part of the consideration for the purchase of the whole of said claim and conveyance thereof to them, to respect and defend the right, title, and possession of C. Hoffman and William R. Stebbins, their heirs and assigns, under the deeds and conveyances theretofore made to them by the locators and owners aforesaid, and to make such other and further deeds, contracts, and conveyances as should be necessary to protect said Hoffman and Stebbins and their assigns in such title and possession.

In the way of counter-claim against said plaintiffs this defendant alleges—

I.

That on the 28th day of February, 1877, the land hereinafter described was a part of the unappropriated public domain of the United States and was land valuable for minerals and containing valuable mineral deposits; and upon information and belief that upon that day Noah Siever, Edward Durham, William Moore, and Thomas Clifton, being citizens of the United States, entered upon and explored the same, and on or about March 6th, 1877, duly located, claimed, and appropriated the same as placer mining ground, the same being valuable as placers, on due compliance with the laws of the United States and Territory of Dakota and with the local laws, customs, and rules of miners in the Whitewood mining district.

9 That the land so located, claimed, and appropriated by the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton was known and described as placer claim No. 15, above discovery, on Whitewood gulch, in the Whitewood mining district, Lawrence county, Dakota Territory, and that thereupon, by such location and appropriation, said Noah Siever and his associates became the owners thereof and thereafter continued in possession thereof, mining and extracting gold therefrom and complying with all the laws, rules, regulations, and customs aforesaid.

II.

Upon information and belief that thereafter, to wit, on or about March 17th, 1877, the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, being the owners and in possession of the land described as placer claim No. 15 as aforesaid, taking with them sundry other persons to defendant unknown on the next adjoining placer claims described as Nos. 13 and 14, above discovery, Whitewood mining district, located and laid out a town upon the same, to wit, on placer claims No. 13, 14, & 15 aforesaid, to wit; the town of Deadwood, subdivided the same into lots and blocks, marking and dedicating certain parts as streets and alleys, platting and recording the same; but it was then and there agreed and understood that the owners of each placer claim aforesaid continued the owners thereof, and of that portion of the town thus created which was coextensive with the bounds of the claim, to wit, Noah Siever, Edward Durham, William Moore, and Thomas Clifton continued the owners of placer claim No. 15 and of that part of such town site thus created situated thereon, and they did so continue owners thereof and remained in possession thereof, and thereafter sold lots and parts of said town site covering said placer claim No. 15, designating and describing the same by the numbers and descriptions adopted in creating the said town site, giving deeds therefor and putting sundry parties in possession thereof, who thereupon made valuable improvements thereon and in divers ways occupied and used the same for purposes of trade, business, and residence.

III.

Upon information and belief that thereafter, to wit, on March 28th, 1877, the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, being then the owners of that portion of placer claim No. 15 and of the town site of Deadwood described as "lot No. 2 A" on Main street, for a good and valuable consideration sold and by a proper instrument purported to grant in fee simple said "lot No. 2 A" to C. Hoffman and W. R. Stebbins, and they became the owners thereof and went into possession thereof; that the said deed was duly filed for record in the office of the register of deeds, Lawrence county, on the 25th day of April, 1877, and recorded in Book A, on page 77.

IV.

Upon information and belief that thereafter the said Noah Siever and Edward Durham segregated from the said claim No. 15 and the said town site their interest therein, and by agreement with their associates were allowed the south ½ of placer claim No. 15 in severalty as their portion of said placer claim and town site; that thereupon they associated with themselves James A. Hamilton and H. J. Scott and sold to them some interest in the property aforesaid, and at the request of C. Hoffman and W. R. Stebbins aforesaid and for their use and benefit erected a valuable improvement, to wit, a

two-story frame building for business purposes, on "lot No. 2 A" aforesaid, and thereupon, after such segregation and improvement, to wit, on April 20th, 1877, the said Noah Siever, Edward Durham, James A. Hamilton, and H. Scott for a valuable consideration made, executed, and delivered to said C. Hoffman and W. R. Stebbins a further grant and deed of conveyance for the lot aforesaid, purporting to be a grant in fee simple, with full covenants of seizin, quiet enjoyment, further assurance, general warranty, and against encumbrances, and that such grant and deed of conveyance was duly filed for record in the office of the register of deeds for Lawrence county on the 20th day of April, 1877, and was duly recorded in Book A of Deeds, pg. 24, 25.

11

V.

That thereafter the said C. Hoffman and W. R. Stebbins held and maintained possession of said real property and used and occupied the same as a bank and for other purposes.

Upon information and belief that on or about the 1st day of June, 1876, the said C. Hoffman, for a good and valuable consideration, sold and by good and sufficient deeds conveyed to W. R. Stebbins all his right, title, and interest in and to the said real property, and thereupon the said Stebbins entered into the sole possession thereof; that said deed was duly filed for record in the office of the register of deeds for Lawrence county on or about the 1st day of June, 1878, and duly recorded in Book — of Deeds, pg. —.

VI.

That on or about the 10th day of August, 1878, the said W. R. Stebbins, for a good and valuable consideration, sold and by a good and sufficient deed conveyed to this defendant the real property before described; that the said deed was duly filed for record August 31st, 1878, in the office of the register of deeds aforesaid and duly recorded in Book No. 23, pg. 54, and thereupon this defendant went into possession of said real property and ever since has been and now is in possession of the same and every part thereof; that said real property is the same as that described in plaintiffs' complaint and there alleged to be in defendant's possession.

12

VII.

Upon information and belief that during the year 1877 and thereafter until the entry and purchase of said placer claim No. 15 from the Government of the United States there was done thereon more than $100.00 worth of work annually for the purpose of holding and maintaining the right to possession thereof in the locators and their grantees, such work to inure to the benefit of persons to whom sales of any specific portions of said claim had been made by the locators and their grantees and protection of the title and possession of such person, to wit, to inure to the benefit of C. Hoffman and W. R. Stebbins and the protection of their title and possession aforesaid.

VIII.

Upon information and belief that plaintiffs' claim some interest in said real property and hold an outstanding apparent legal title thereto derived from the United States, the full facts in relation to which are as follows, as defendant is informed and believes:

That on the 16th day of March, 1877, said Noah Siever, Edward Durham, William Moore, and Thomas Clifton were the owners in possession of placer claim No. 15 aforesaid, and thereafter made a deed as aforesaid to defendant's grantors, then being in possession of the said placer claim No. 15, for the purpose of mining the same under their location and mining right, but that thereafter, to wit, June 26, 1877, subject to the grants and conveyances to C. Hoffman and W. R. Stebbins as aforesaid and obligated to protect them in their title and possession, said Siever and associates sold and conveyed all their right, title, and interest to said placer claim to F. T. Sutherland, Henry Lake, and J. J. Sutherland, but that said F. T. Sutherland, Henry Lake, and J. J. Sutherland then and there purchased the same with full notice and knowledge of the title and possession of C. Hoffman and W. R. Stebbins as aforesaid,
13 and, as a part of the consideration of the purchase from said Noah Siever and associates and the sale and conveyance by them as aforesaid, contracted and agreed to protect and defend the title and possession of C. Hoffman and W. R. Stebbins and their assigns in and to the portion of such claim theretofore conveyed to them as aforesaid and to hold any title which they, the said Sutherland and associates, might acquire under and by virtue of said purchase, subject to said conveyance, to C. Hoffman and W. R. Stebbins, and to make them or their assigns such further contract or conveyance as might be necessary to protect their title and possession as aforesaid.

That on the 25th day of July, 1877, the said J. J. Sutherland sold and conveyed his interest, purporting to be a one-third interest in said placer claim No. 15, to F. T. Sutherland, and on the same day F. T. Sutherland sold and conveyed his interest, purporting to be an undivided one-third interest in said claim, to Edward Welsh; that on Jan'y 5th, 1878, Henry Lake sold and conveyed his interest, purporting to be an undivided one-third interest in said placer claim No. 15, to Hugh McCaffrey and Henry Suessenbach; that thereupon said S. T. Sutherland, Edward Welsh, Hugh McCaffrey, and Henry Suessenbach claimed to own said placer claim No. 15 and the whole thereof, but that their alleged ownership had been acquired with full notice and knowledge of the title and possession of C. Hoffman and W. R. Stebbins as aforesaid and subject to the contract and agreement made by the said F. T. Sutherland, Henry Lake, and J. J. Sutherland at the time of purchasing the same from Noah Siever and his associates in favor of W. R. Stebbins and C. Hoffman as aforesaid; that on or about the 15th day of May, 1878, the said F. T. Sutherland, Hugh McCaffrey, Henry Suessenbach, and Edward Welsh, by Frank Welsh, adm'r of his estate,
14 said Edward Welsh having in the meantime died, claimed

by virtue of the conveyances aforesaid to be the owners of placer claim No. 15, above discovery as aforesaid, and, so claiming, caused a survey to be made thereof and applied for a patent thereof in the United States land office, Deadwood, D. T., and such proceedings were had thereafter that on July 16th, 1878, said parties last named made an entry and purchase of said placer claim as mineral lot No. 86 at said land office, including that part thereof belonging to defendant's grantors, C. Hoffman and W. R. Stebbins, and thereafter, February 15th, 1882, patent issued for said placer claim No. 15 as mineral lot No. 86 to Henry Suessenbach, Hugh McCaffrey, Frank T. Sutherland, and the heirs of Edward Welsh, deceased; and thereafter said patent was filed for record in the office of the register of deeds, Lawrence county, August 21st, 1882, and duly recorded in Book No. 26, pg. No. 45, of the records of said office.

That in the application to enter said placer claim the applicants aforesaid in their sworn application, to wit, in the abstract of title attached thereto as an exhibit and made a part thereof, showed and declared the fact to be that they traced their title to said claim to the locators aforesaid, Noah Siever, Edward Durham, William Moore, and Thomas Clifton, and claimed under conveyances from them and by virtue of their location, development, and work; but the said claimants for entry neglected to exhibit full and complete abstract of title and omitted to show the abstract of conveyances to C. Hoffman and W. R. Stebbins for part of such placer claim heretofore described conveyed to them, but that the said applicants for entry had full notice of such conveyance to said W. R. Stebbins and C. Hoffman and of the agreement made at the time of the conveyance by Noah Siever and associates to F. T. Sutherland,
15 Henry Lake, and J. J. Sutherland, heretofore referred to, assuming and promising to respect and protect the title and possession of said C. Hoffman and W. R. Stebbins to the said portion of said placer claim as a part of the consideration for conveyance from Noah Siever and associates to F. T. Sutherland and associates aforesaid. The said applicants for entry of said placer claim had assumed and were bound by said agreement and made their entry with full knowledge thereof, under the obligation to protect, respect, and defend the title and possession of said C. Hoffman and W. R. Stebbins and their assigns; that prior to the issuance of said patent, to wit, July 6th, 1878, the said F. T. Sutherland had sold and conveyed all his right, title, and interest, alleged to be an undivided one-third, in said claim to Hugh McCaffrey and Henry Suessenbach by deed of that date, filed for record July 21st, 1882, and recorded in Book No. 20, pg. 428; that on or about the 5th day of August, 1882, Frank Welsh, Samuel Welsh, Mary Welsh, Lydia Welsh, and Mary Franklin, heirs-at-law of Edward Welsh, deceased, sold and conveyed all their interest in said claim, alleged to be an undivided one-third interest, to Henry Suessenbach by deed of that date, filed for record August 5th, 1882, recorded in Book No. 26, pg. 75; that on or about August 10th, 1882, Henry Suessenbach and Hugh McCaffrey sold and conveyed to Daniel McLaughlin and W. R. Steele an undivided one-fourth interest in their claim to the land in con-

troversy described in the complaint and other lands by deed of that date, filed for record Jan'y 16th, 1883, and recorded in Book No. 26, pg. 447.

IX.

Further, upon information and belief, that all of said several deeds were taken by the grantees with full notice and knowledge of the adverse possession of defendant's grantors aforesaid
16 and of defendant and of the title under which defendant claims and of the source of title of the applicants for entry as aforesaid, to wit, that they traced their title to the locators of said mining claim, and that it was purchased of said locators under an agreement as aforesaid, which was part of the consideration thereof, to protect and defend the title and possession of C. Hoffman and W. R. Stebbins in the portion thereof theretofore purchased by them as hereinbefore described, and that the said plaintiff-, by reason of the premises and the facts in this said counter-claim pleaded and set forth, hold their said title derived from the United States as aforesaid in trust for this defendant for that portion described in their complaint of which plaintiff- *is* in possession, and that plaintiffs should, in justice and equity, be required to convey said title which they so hold to said portion to this defendant.

X.

That defendant has always been and now is ready and willing and hereby offers to pay to plaintiff- a just proportion of the legal expenses incurred in procuring the said patent to issue.

For a second counter-claim this defendant alleges:

I.

That on the 28th day of March, 1877, and on the 20th day of April, 1877, defendant's grantors, C. Hoffman and W. R. Stebbins, acquired title to the real property and premises in controversy in this action by purchase from the owners thereof, as in the first counter-claim fully detailed and set forth, the allegations relative to which are now particularly referred to and made a part hereof the same as if here repeated.

II.

That prior to the 8th day of May, 1878, defendant's said grantors had caused to be erected and made upon said real property
17 certain valuable permanent improvements, to wit, a two-story frame building about twenty feet front and about sixty feet deep, of the value of $3,000.00, and occupied and used the same for banking and other purposes, and thereafter sold the same to this defendant and conveyed the same as in the first counter-claim alleged.

That on or about the 26th day of September, 1879, said building and improvement was destroyed by fire, and that thereupon forthwith and prior to Jan'y 1st, 1880, this defendant made and erected

in lieu thereof, upon the real property and premises aforesaid, the certain valuable permanent improvement ever since and now standing thereon, to wit, the two-story brick building, 21 feet front by 70 feet in depth and affixed to the soil, of the value of $10,000.00, then and since used and occupied by defendant as a banking-house and for offices, et cetera.

III.

That defendant's said grantors at the time of making said first-described improvement were holding under color of title adversely to the claim of plaintiffs and their grantors, to wit, under a title derived from the locators and owners of the ground, as in the first counter-claim stated and set forth and now particularly referred to the same as if made a part hereof, and that defendant at the time of making said last-described improvement was holding under color of title adversely to the claim of plaintiffs and their grantors, to wit, under title derived from the locators and owners of the ground aforesaid, through C. Hoffman and W. R. Stebbins, as before alleged and as more fully stated in the first counter-claim, reference to which is hereby made the same as if here pleaded.

IV.

That said valuable permanent improvement first named was made by defendant's grantors in good faith, claiming title as
18 aforesaid, and while an occupant of the real property aforesaid and believing themselves to be the owners thereof, and the last-named valuable permanent improvement was made by defendant in good faith, claiming title as aforesaid, and while an occupant of the real property aforesaid, believing itself to be the owner thereof.

V.

That the value of said real property, aside from the said valuable permanent improvement, is not to exceed $3,000.00.

Wherefore this defendant prays:

I.

That plaintiff- may take nothing by this action.

II.

That defendant may be decreed to have a good and clear title to the premises aforesaid, described as "lot No. 2 A," on Main street, in the city of Deadwood, and as more particularly described in the complaint; that plaintiffs have no right, title, interest, or estate therein.

That plaintiffs be required to convey to defendant all the right, title, and interest, claim, and demand of every kind whatever in or to said real property in said complaint described, and thereafter to be forever barred from setting up or asserting any right, title, interest, or claim in or to said premises or any part thereof.

IV.

That in the event it should be determined that defendant is not the rightful owner of said property and not entitled to the relief above prayed for, but that plaintiffs are entitled to recover the same, then that the value of the land, aside from the value of the improvements thereupon, and also the separate value of the improvements, be specified and found, and that defendant have judgment for the value of its said improvements, and that plaintiffs be required to pay to defendants the value of its improvements as so found.

V.

For such other and further relief as may be equitable and just and for the costs of this suit.

VAN CISE & WILSON,
G. C. MOODY,
Attorneys for Defendant.

19 TERRITORY OF DAKOTA, } ss:
Lawrence County, }

D. A. McPherson, being sworn, says he is an officer, to wit, cashier, of the defendant corporation, has heard the foregoing amended answer read, and the same is true of his own knowledge except as to matters therein stated on information and belief, and as to them he believes it to be true.

D. A. McPHERSON.

Subscribed and sworn to before me this 13th day of August, A. D. 1885.

[SEAL.] S. M. HOUGHTON,
Notary Public.

[Endorsed:] Henry Suessenbach *et al. v.* First National Bank. Amended answer. Services admitted by copy August 13, 1885. McLaughlin & Steele, att'ys for pl'ff. Filed Jan'y 13th, 1887. W. H. Jones, clerk, by A. A. Raymond, dep.

20 TERRITORY OF DAKOTA, }
County of Lawrence. }

In District Court, First Judicial District.

HENRY SUESSENBACH, HUGH MCCAFFREY, DANIEL MCLAUGHLIN, & WILLIAM R. STEELE, Plaintiffs,
vs.
FIRST NATIONAL BANK OF DEADWOOD, DAKOTA, Defendants.

Reply.

The plaintiff's, for reply to the counter-claims set up in the answer herein:

First. Deny that they have any knowledge or information sufficient to constitute a belief whether the facts stated in defendant's

counter-claims relative to the cost of improvements upon the premises in controversy in this action made by the defendant since the Deadwood fire, in September, 1879, and by its grantors prior thereto, are true or not and ask judgment as in the complaint.

McLAUGHLIN & STEELE,
Att'ys for Pl'ffs.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Daniel McLaughlin, being first duly sworn, deposes and says that he is one of the plaintiffs in the action herein; that he has heard read the foregoing reply, knows the contents thereof, and that the same is true of his own knowledge except those matters stated on information and belief, and as to those he believes it to be true.

DANIEL McLAUGHLIN.

Subscribed and sworn to before me this 18th day of August, A. D. 1885.

[SEAL.] WILLIAM L. McLAUGHLIN,
Notary Public.

21 [Endorsed:] In district court. Henry Suessenbach *vs.* First National Bank. Reply. Service admitted by copy this 18th day of August, 1885. Van Cise & Wilson & G. C. Moody, att'ys for def't. Filed Sept. 14, 1885. A. R. Z. Dawson, clerk. McLaughlin & Steel, atty's for pl'ffs.

22 In the District Court of the First Judicial District of the Territory of Dakota with- and for the County of Lawrence.

HENRY SUESSENBACH, HUGH McCAFFREY, DANIEL McLAUGHLIN, and WILLIAM R. STEELE, Plaintiffs,
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, DAKOTA, Defendant.

Bill of Exceptions.

The issues in said action came on for trial before the district court of the first judicial district of Dakota Territory in and for Lawrence county at a regular term thereof, on the 13th day of January, 1886. A jury was called to try the issues between plaintiffs and defendant arising on the pleadings, which was duly impanelled and sworn to well and truly try the same.

The plaintiffs, to maintain the issues on their part, first offered in evidence a patent from the United States to Henry Suessenbach, Hugh McCaffrey; the heirs of Edward Welsh, deceased, and Frank Sutherland, conveying certain mining land embracing the ground in controversy, which patent is marked Exhibit "A" and is in the words and figures following, to wit:

23 (EXHIBIT "A.")

THE UNITED STATES OF AMERICA:

General Land Office No., 5368; mineral certificate No. 24.

To all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, there have been deposited in the General Land Office of the United States the plat and field-notes of survey of the placer mining claim of Henry Suessenbach, Hugh McCaffrey; the heirs of Edward Welch, deceased, and Frank T. Sutherland, accompanied by the certificate of the register of the land office at Deadwood, in the Territory of Dakota, whereby it appears that in pursuance of the said Revised Statutes of the United States the said Henry Suessenbach, Hugh McCaffrey; the heirs of Edward Welch, deceased, and Frank T. Sutherland did, on the sixteenth day of July, A. D. 1878, enter and pay for said mining claim or premises, being mineral entry No. 24 in the series of said office, designated by the surveyor general as lot No. 86, embracing a portion of the unsurveyed public domain in the Whitewood mining district, in the county of Lawrence and Territory of Dakota, in the district of lands subject to sale at Deadwood, containing three and forty-seven hundredths (3.47) acres of land, more or less, and, according to the returns on file of the General Land Office, bounded, described, and platted as follows, with magnetic variation at fifteen (15) degrees east, to wit: Beginning at corner No. 1, a sandstone 16 x 8 x 4 inches in size, marked "No. 1" on one side and "M." C. "86" on the opposite side, the same being the northwest corner of placer claim No. 26 below discovery, from which the southeast corner of a dwelling-house bears north sixty-nine (69) degrees forty (40) minutes
24 west at the distance of twenty-five (25) feet; thence from said corner No. 1 along William street north thirty-one (31) degrees east one hundred and ten (110) feet to corner No. 2, a post four (4) inches square, marked "No. 2" on one side and "M. C. 86" on opposite side and No. 1 on one side and M. C. 76 on the opposite side, the same being corner No. 1 of lot No. 76, from which U. S. locating monument No. 1 bears south three (3) degrees forty-eight (48) minutes west at the distance of nineteen hundred and eighty-four (1,984) feet; thence from said corner No. 2 along southerly boundary of said lot No. 76 south fifty-nine (59) degrees fifteen (15) minutes east six hundred and seventy-three (673) feet, cross Whitewood creek seven hundred and twenty-three (723) — to corner No. 3, a post four (4) inches square, in mound of stones marked "No. 3" on one side and "M. C. 86" on the opposite side and "No. 4" on one side and M. C. 76 on the opposite side, the same being corner No. 4 of said lot No. 76; thence south fourteen (14) degrees fifteen (15) minutes west two hundred and thirty (230) feet to corner No. 4, a post four (4) inches square, in mound of stones marked "No. 4"

Plat of the Placer Claim of H E N R Y S U E S S E N -

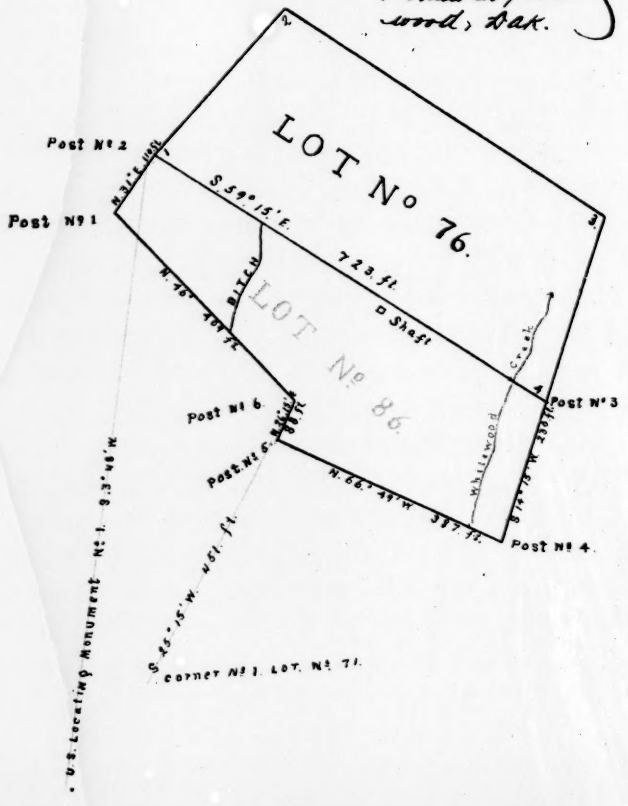
B A C H, et al, Whitewood Mining District, Lawrence County, Dakota.

Containing 3.47 Acres.

Scale 200 ft to an inch.

Var. 15° E.

No. 68.
Suessenbach et al.
1st Mattd. Bk of Stad.
wood, Dak.
p. 26.



on one side and "M. C. 86" on the opposite side, situate in the rear of Deadwood post office; thence north sixty-six (66) degrees forty-nine (49) minutes west fifty (50) feet, -cross said creek three hundred and eighty-seven (387) feet to corner No. 5, a post four (4) inches square, marked "No. 5" on one side and "M. C. 86" on the opposite side, situate on southerly boundary of placer claims Nos. 24 and 25 below discovery, from which corner No. 1 of lot No. 71 made for the placer claim of Jacob S. Anthony *et al.* bears south twenty-five (25) degrees fifteen (15) minutes west at the distance of four hundred and fifty-one (451) feet; thence from said corner No. 5
25 along southerly boundary of said placer claims Nos. 24 and 25 below discovery north twenty-five (25) degrees fifteen (15) minutes east sixty-eight (68) feet to corner No. 6, a sandstone 16 x 8 x 6 inches in size, marked "No. 6" on one side and "M. C. 86" on the opposite side, situate at the northwest corner of the Occidental chop-house, on Lee street, Deadwood city; thence along Lee street and boundary line between Lost and Whitewood mining districts north forty-six (46) degrees west one hundred (100) feet, -cross Main street one hundred and fifty (150) feet, -cross Ditch four hundred and nine (409) feet to the place of beginning, containing three and forty-seven hundredths ($3\frac{47}{100}$) acres of land, more or less, as represented by yellow shading in the following plat, said claim being commonly known as placer claim No. 15 above discovery:

(Here follows diagram marked p. 26.)

27 Now, know ye that the United States of America, in consideration of the premises and in conformity with the said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said Henry Suessenbach, Hugh McCaffrey; the heirs of Edward Welch, deceased, and Frank T. Sutherland and to their heirs and assigns the said placer mining premises hereinbefore described as lot No. 86, embracing a portion of the unsurveyed public domain:

To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Henry Suessenbach, Hugh McCaffrey; the heirs of Edward Welch, deceased, and Frank T. Sutherland and to their heirs and assigns forever, subject, nevertheless, to the following conditions and stipulations:

First. That the grant hereby made is restricted in its exterior limits to the boundaries of the said lot No. 86, as hereinbefore described, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnaber, lead, tin, copper, or other valuable deposits which may have been discovered within said limits subsequent to May the 15th, A. D. one thousand eight hundred and seventy-eight, and which were not claimed or known to exist at said last-named date.

Second. That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnaber, lead, tin, copper, or other valuable deposit- be claimed or known to exist within the above-

described premises at said last-named date, the same is expressly excepted and excluded from these presents.

Third. That the premises hereby conveyed may be entered by the proprietor of any vein or lode of quartz or other rock in place bearing gold, silver, cinnaber, lead, tin, copper, or other valuable
28 deposits for the purpose of extracting and removing the ore from such vein, lode, or deposit should the same or any part thereof be found to penetrate, intersect, pass through, or dip into the mining ground or premises hereby granted.

Fourth. That the premises hereby conveyed shall be held subjected to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts.

Fifth. That in the absence of necessary legislation by Congress the legislature of Dakota may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to the complete development thereof.

In testimony whereof I, Chester A. Arthur, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the fifteenth day of February, in the year of our Lord one thousand eight
[SEAL.] hundred and eighty-two, and of the Independence of the United States the one hundred and sixth.

By the President:

CHESTER A. ARTHUR,
By WM. H. CROOK, *Secretary.*
S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. 67, pages 85 to 90, inclusive; examined.

29 Plaintiff then offered in evidence a deed from one of the patentees, Frank T. Sutherland, to Henry Suessenbach and Hugh McCaffrey, executed the 6th day of July, 1878, acknowledged the same date, filed for record in the office of the register of deeds of Lawrence county, Dakota, the 6th day of July, 1878, conveying an undivided one-third interest in and to mineral claim No. 86, marked Exhibit "B," and which is as follows:

30 (EXHIBIT "B.")

This indenture, made the sixth day of July, in the year of our Lord one thousand eight hundred and seventy-eight, between F. T. Sutherland, of the county of Lawrence and Territory of Dakota, party of the first part, and Hugh McCaffrey and Henry Suessenbach of the county of Lawrence and Territory of Dakota, parties of the second part, witnesseth:

That the said party of the first part, for and in consideration of

the sum of one thousand $\frac{00}{100}$ dollars lawful money of the United States of America, to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto the said parties of the second part, and to their heirs and assigns, an undivided one-third ($\frac{1}{3}$) interest of placer claim number fifteen (15) above discovery, on Whitewood creek, Whitewood mining district, Lawrence county, Dakota Territory, being lot No. 86, as per official survey. Also all right, title and interest in and to the United States patent applied for, for said mining ground, including surface ground.

Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein; and all the right, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also, all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the said premises, and every part and parcel thereof, with the appurtenances:

31 To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said parties of the second part, their heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

F. T. SUTHERLAND. [SEAL.]

Signed, sealed and delivered in the presence of—
C. H. McKINNIS.

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

I, C. H. McKinnis, register of deeds in and for said county, in the Territory aforesaid, do hereby certify that F. T. Sutherland, personally known to me as the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and official seal this 6th day of July, A. D. 1878.

C. H. McKINNIS,
Register of Deeds.

[SEAL.]

(Endorsed:) Mining deed. F. T. Sutherland to H. McCaffrey and H. Suessenbach. Territory of Dakota, county of Lawrence, *ss:* I hereby certify that this deed was filed for record in my office at

10.15 o'clock a. m., July 6th, 1878, and is duly recorded in Book 20, page No. 154. C. H. McKinnis, clerk and recorder. Mining deed. F. T. Sutherland to Hugh McCaffrey *et al.* Territory of Dakota, county of Lawrence, *ss:* I hereby certify that this instrument was filed for record in my office at 5.35 o'clock p. m. July 21, 1882, and is duly recorded in Book 20, page 428. J. S. Tracy, register of deeds, by C. F. Tracy, dep.

32 Plaintiffs then offer in evidence powers of attorney from Lydia A. Welch, Mary Welch, Samuel Welch, and Mary E. Franklin, heirs of the estate of Edward Welch, deceased, to Frank Welch, another heir of said Edward Welch, deceased, authorizing and empowering him to make, execute, and deliver deeds and conveyances in their names of any real property in which they had an interest in the Territory of Dakota, which were duly acknowledged and recorded and were received in evidence. Said powers of attorney are respectively marked Exhibits "C" and "D," and are as follows:

33 (EXHIBIT "C.")

Know all men by these presents that I, Lydia A. Welch, of the county of Marion, in the State of Indiana, reposing special trust and confidence in Frank Welch, of the county of Lawrence, in the Territory of Dakota, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, the said Frank Welch my true and lawful attorney for me and in my name, place, and stead, for my sole use and benefit, to grant, bargain, sell, convey, transfer, and deliver all the right, title, claim, and demand that I may have in and to any real, personal, and mining — situate, lying, and being in the Territory of Dakota, said property lying and being mostly in the counties of Lawrence and Pennington, in said Territory, my interest — said property being derived through my late husband, Judson Welch, as heir of his deceased brother, Edward Welch.

And I do further authorize and empower my said attorney to make, execute, and deliver for me and in my name, place, and stead all deeds, bills of sale, and other instruments of writing necessary to transfer, bargain, sell, and convey whatever right, title, or interest I am entitled to or may have or be entitled to in said property, real, personal, and mining, my intention being to authorize my said attorney to sell and convey and deliver to the purchaser or purchasers thereof any and all property, of whatsoever kind or nature, situate and being in the Territory aforesaid which I own or in which I may have an interest, and also to authorize and empower him to sign and execute for me and in my name all deeds and other instruments of writing necessary to convey and transfer the same—

Hereby giving and granting unto our said attorney full power and authority to do and perform all and every act and thing what-

soever requisite and necessary to be done in and about the
34 premises as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitutes shall lawfully do or cause to be done by virtue hereof.

In witness whereof I have hereunto set my hand and seal this 1st day of May, A. D. 1878.

LYDIA A. WELCH. [SEAL.]

STATE OF INDIANA, }
County of Marion, } *ss:*

On this 1st day of May, A. D. 1878, before me, Le Roy N. Pattison, a notary public in and for the county of Marion, in the State of Indiana, personally appeared Lydia A. Welch, known to me to be the person who is described in and who executed the within instrument and power of attorney, and acknowledged to me that she executed the same.

Witness my hand and notarial seal this 1st day of May, A. D. 1878.

[SEAL.] LE ROY N. PATTISON,
Notary Public.

(Endorsed:) Power of attorney. Lydia A. Welch to Frank Welch. Territory of Dakota, county of Lawrence, *ss:* I hereby certify that this instrument was filed for record in my office at 11.30 o'clock a. m., Aug. 5, 1882, and is duly recorded in Book 21, page 482. J. S. Tracy, register of deeds, by Jno. McCarthy, deputy. Power of attorney, Lydia A. Welch to Frank Welch. Filed at 10.10 a. m. on the 11th day of May, 1878, and recorded in Book C, page 280. C. H. McKinnis, recorder. Lydia A. Welch to Frank Welch. (Power of attorney.)

35 (EXHIBIT "D.")

Know all men by these presents that we, Mary Welch, Samuel Welch, and Mary E. Franklin, a married woman, wife of O. E. Franklin, all of the county of Lincoln, in the State of Nebraska, reposing special trust and confidence in Frank Welch, of the county of Lawrence, in the Territory of Dakota, have made, constituted, and appointed and by these presents do make, constitute, and appoint the said Frank Welch our true and lawful attorney for us and each of us and in our and each of our names, place, and stead, for our sole use and benefit, to grant, bargain, sell, convey, transfer, and deliver all the right, title, claim, and demand that we and each and either of us may have in and to any and all real, personal, and mining property situate, lying, and being in the Territory of Dakota, said property lying and being mostly in the counties of Lawrence and Pennington, in said Territory, the interest in said property owned by the undersigned being inherited by us as heirs-at-law of Edward Welch, deceased.

And we do hereby further authorize and empower our said attorney to make, execute, and deliver for us and each of — and in our several names, place, and stead all deeds, bills of sale, and other instruments of writing necessary to transfer, bargain, sell, and convey whatever right, title, or interest we or either of us are entitled to or may have or *to* be entitled to in said property, real, personal, and mining, the intention of the makers hereof being to authorize our said attorney to sell and convey and deliver to the purchaser or purchasers thereof any and all property of whatsoever kind or nature, situate and being in the Territory aforesaid, which we or either of us own or in which we or either of us may have
36 an interest; and also to empower and authorize him to sign and execute for us and in our several names all deeds and other instruments of writing necessary to convey and transfer the same—

Hereby giving and granting unto our said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as we and each of us might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that our said attorney or his substitutes shall lawfully do or cause to be done by virtue hereof.

In witness whereof we hereunto set our hands and seals this — day of ——, A. D. 1878.

MARY WELCH. [SEAL.]
SAM'L WELCH. [SEAL.]
MARY E. FRANKLIN. [SEAL.]

STATE OF NEBRASKA, } ss:
County of Lincoln, }

On this first day of May, A. D. 1878, before me, Cain Brunt, a clerk of the district court in and for the county of Lincoln, in the State of Nebraska, personally appeared Mary Welch and Samuel Welch, known to me to be two of the persons who are described respectively in and who executed the within instrument and power of attorney, and acknowledged to me that they respectively executed the same.

Witness my hand and official seal this 1st day of May, A. D. 1878.

CAIN BRUNT,
[SEAL.] *Clerk of the District Court.*

STATE OF NEBRASKA, } ss:
County of Lincoln, }

On this first day of May, A. D. 1878, before me, Cain Brunt, a clerk of the district court in and for the county of Lincoln, in the State of Nebraska, personally appeared Mary E. Franklin,
37 known to me to be the person who is described as a married woman in and whose name is subscribed to the within instrument and power of attorney, and, upon an examination without the

hearing of her husband, I made her acquainted with the contents of the instrument, and thereupon she acknowledged to me that she executed the same freely, and that she does not wish to retract such execution.

Witness my hand and official seal this first day of May, A. D. 1878.

CAIN BRUNT,
[SEAL.] *Clerk of the District Court.*

(Endorsed:) Power of attorney. Mary Welch *et al.* to Frank Welch. Territory of Dakota, county of Lawrence, *ss:* I hereby certify that this instrument was filed for record in my office at 11.30 o'clock a. m. Aug. 5, 1882, and is duly recorded in Book 21, page 482. J. S. Tracy, register of deeds, by Jno. McCarthy, deputy. Power of attorney. Mary Welch *et al.* to Frank Welch. Filed at 10.10 a. m. on the 11th day of May, 1878, and recorded in Book C, page 278. C. H. McKinniss, recorder. Mary Welch *et al.* to Frank Welch. (Power of attorney.)

38 Plaintiffs next offered in evidence a warranty deed duly executed from Frank Welch, Samuel Welch, Mary Welch, Lydia A. Welch, and Mary E. Franklin, heirs of Edward Welch, deceased, dated the first day of August, 1882, and filed for record in the office of the register of deeds of Lawrence county, Dakota, August 5th, 1882, and recorded in Book 26, page 75, to Henry Suessenbach, of an undivided one-third interest in mineral claim No. 86, situate in the town site of Deadwood, as per plat of said claim on file in the office of the register of deeds of said county of Lawrence, and which was received in evidence and is marked Exhibit "E" and is as follows:

39 (EXHIBIT "E.")

This deed made this first day of August in the year of our Lord one thousand eight hundred and eighty-two, between Frank Welch, and Sam'l Welch, Mary Welch, Lydia Welch and Mary E. Franklin by Frank Welch, their attorney-in-fact, of the county of Lawrence and Territory of Dakota, of the first part, and Henry Suessenbach of the county of Lawrence, and Territory of Dakota, of the second part, witnesseth,

That the said parties of the first part, for and in consideration of the sum of one dollars, to the said parties of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold and conveyed, and by these presents do—grant, bargain, sell, convey and confirm unto the said party of the second part, his heirs and assigns forever, all the right, title, interest, claim and demand, which the said party of the first part has in and to the following-described lot—of parcel—of land, situate, lying and being in the county of Lawrence and Territory of Dakota, to wit: An undivided one-third interest in mineral claim No. 86, situated within the town

site of Deadwood, as per plat of said claim on file in the office of the recorder of Lawrence county, Dakota Territory. Patent to which has been issued and is now on file in the said recorder's office of Lawrence county, Dakota Territory. Also the west twenty-four feet of lot No. one, situated on the N. W. corner of Main and Mill streets in Lead City, Lawrence county, Dakota Territory, being 24 feet front on said Main street, and running back from said street in even width sixty-four feet.

To have and to hold the same, together with all and sin-
40 gular the tenements, hereditaments, privileges and appurtenances thereunto belonging, to the said party of the second part, his heirs and assigns forever; and the said parties of the first part do—hereby release and waive all right under, and benefit of, the homestead laws of the United States, in *a* and to—the lands and premises aforesaid; and the said grantors for themselves and their heirs, executors and administrators, covenant—and agree—to and with the said party of the second part and his assigns, that at the time of the ensealing and delivery of these presents, they are well seized of said premises in fee simple, and have good right, full power and lawful authority to grant, bargain and sell the same, in manner and form as aforesaid; that the same are free and clear of all liens and incumbrances whatever, and that they will warrant and forever defend the same to the said party of the second part, his heirs and assigns forever, against the claim or claims of all and every person whatsoever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in presence of

FRANK WELCH. [SEAL.]
SAMUEL WELCH,
By FRANK WELCH, [SEAL.]
His Att'y-in-Fact.
MARY WELCH,
By FRANK WELCH, [SEAL.]
Her Att'y-in-Fact.
LYDIA A. WELCH,
By FRANK WELCH, [SEAL.]
Her Att'y-in-Fact.
MARY E. FRANKLIN,
By FRANK WELCH, [SEAL.]
Her Att'y-in-Fact.

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

On this 5th day of August, in the year of our Lord one thousand eight hundred and eighty-two, before me, James S. Mullaly, a notary public within and for said county, personally appeared Frank
41 Welch, known to me to be the person who is described in and who executed the within instrument, and acknowledged to me that he executed the same.

And I further certify that on this 5th day of August, A. D,

1882, before me, James S. Mullaly, a notary public within and for said county, personally appeared Frank Welch, known to me to be the person who is described in and whose name is subscribed to the within instrument as the attorney-in-fact of Samuel Welch, Mary Welch, Lydia Welch, and Mary E. Franklin, and acknowledged to me that he subscribed the names of Samuel Welch, Mary Welch, Lydia Welch, and Mary E. Franklin thereto as principals and his own name as attorney-in-fact.

In witness whereof I have hereunto set my hand and notarial seal the day and year last above written.

JAMES S. MULLALY,
[SEAL.] *Notary Public.*

(Endorsed:) Warranty deed. Frank Welch *et al.* to Henry Suessenbach. Territory of Dakota, county of Lawrence, *ss:* Filed for record this 5th day of Aug., 1882, at 11.45 o'clock a. m. Recorded in Book 26, page 75. J. S. Tracy, recorder, by Jno. McCarthy, deputy recorder.

42 Plaintiffs then offered in evidence a deed of an undivided one-fourth interest in said mineral claim No. 86 by Hugh McCaffrey and Henry Suessenbach to Daniel McLaughlin and William R. Steele, of date the 10th day of August, 1882, acknowledged before James S. Mullaly, a notary public, and filed for record January 16th, 1883, in the office of the register of deeds of said county of Lawrence, Dakota, marked Exhibit "F," and which is as follows:

43 (EXHIBIT "F.")

Know all men by these presents that we, Henry Suessenbach and Hugh McCaffrey, of Douglas county, State of Nebraska, parties of the first part, and Daniel McLaughlin and William R. Steele, of Lawrence county, Dakota Territory, parties of the second part, witnesseth:

That whereas the said parties of the first part are now the owners in fee simple of the following-described lots and parcels of land in that portion of the city of Deadwood known and patented as mineral claim No. 86, and a plat of which has been filed in the office of the register of deeds in and for Lawrence county, Dakota Territory, by P. G. Ault, county surveyor, which plat correctly shows the lots by numbers and the blocks by letters L, A, and B and by the figures 2 and 3, and also shows correctly the streets and alleys of said city of Deadwood upon said mineral claim No. 86, and which plat is dated July 27th, 1882, to wit:

Fractions of lots No. 6 and 7, in block L, fronting on the easterly side of Williams street, being about 25 feet front on said Williams street and extending back down the hill of even width 44 feet.

Lot No. 2, in block No. 3, upon which the First National Bank building is now situated.

That portion of lot No. 8, in block 3, built upon and occupied by

Jacob Shoudy, and being 14 feet in width, fronting on Main street and extending back along the westerly line of said lot of even width throughout 100 feet.

A fractional part of lot No. 14 adjoining on the northerly side the lot owned and occupied by Koenigsberger Bros., and which fraction fronts on Main street 8.1 feet and runs back to a point on the
44 northerly line of lot 12 at a distance of 74 feet from side street.

Lots No. 1, 1½, 32, 33, and 3, block A, the same fronting 52.2 feet on Main street and extending back at a right angle with Main street 100.5 feet and being 56 feet wide at the rear or easterly end.

Lot No. 7, in said block A, fronting 19.7 feet on Main street and extending back in an easterly direction of even width throughout 115.5 feet.

A fraction of lot No. 5, in block A, on Main street, fronting 2.5 feet on Main street and extending back of even width through to the southerly side of lot No. 7 100 feet.

Lot No. 34, in block A, fronting 25 feet on Lee street, extending back in a northerly direction 83.5 feet, less a small angle off of the northeast corner.

Lot 35, in block A, fronting 16 feet on Lee street and extending back northerly 50 feet, more or less.

Lot No. 36, in block A, fronting 21 feet on Lee street and extending back in the form of a triangle 33 feet.

Lot 37, in block A, fronting 25 feet on Lee street and extending back 92.5 feet, more or less.

Lot 39, in block A, fronting 13 feet on Lee street and extending back 37 feet.

Lot 41, in block A, fronting eighteen feet on Lee street and extending back 35.5 feet.

Lot 42, in block A, 25 feet front on Lee street and extending back northerly 34.5 feet.

Lot No. 43, in block A, 25 feet front on Lee street and extending back 34 feet on Sherman street.

Lot No. 44, in block A, fronting 16 feet on Sherman street and extending back at a right angle 68 feet.

Lot No. 46, in block A, fronting 25 feet on Sherman street and extending back 68 feet.

45 Fraction of lot No. 49, in block A, in rear of lot No. 11, in block A, and being about 23.3 in width by about 30 feet in length.

Lot No. 19, in block B, fronting 26.3 — on Lee street and extending back 62 feet, more or less.

Lot No. 17, in block B, fronting 23.3 feet on Lee street and running back 82 feet.

Lot No. 7, in block B, fronting 1.78 feet on Lee street and extending back about 86 feet.

Lot No. 5, block B, fronting 19 feet on Lee street and extending back fifty feet.

Lot No. 3, in block B, fronting 17.4 feet on Lee street and extending back 50 feet.

Lot No. 12, in block B, fronting 25 feet on Sherman street and extending back 30 feet.

Lot No. 14, in block B, fronting 25 feet on Sherman street and extending back 63 feet.

Lot No. 16, in block B, fronting 25 feet on Sherman street and extending back 63 feet.

Fraction of lot No. 19, in block 2, in the form of a triangle, fronting 2.8 feet on Sherman street and extending back in an easterly direction 66.5 feet, where it gradually widens out to 18.6 feet.

Lot No. 17, in block 2, fronting 25 feet on Sherman street and extending back 66.5 feet.

Lot No. 15, in block 2, fronting 25 feet on Sherman street and extending back 70 feet.

Lot No. 13, in block 2, fronting 25 feet on Sherman street and extending back 71.5 feet.

Lot No. 11, block 2, 25 feet front on Sherman street, extending back 74 feet.

46 Lot No. 5, in block 2, fronting 25 feet on Sherman street & extending back 82 feet.

Lot No. 1, in block 2, 25 feet front on Sherman street and extending back 87.3 feet.

Now, in consideration of the sum of one dollar, lawful money of the United States, to the said parties of the first part in hand paid by the said parties of the second part, and the receipt of which is hereby acknowledged, and of the further consideration of past legal services rendered to said parties of the first part by said parties of the second part since December, 1878, in connection with obtaining the United States patent for said lot M. C. 86 and for such services as may hereafter be rendered by said parties of the second part as attorneys in necessary litigation in reference to the title to the above-described property, and for other good and sufficient consideration, the said parties of the first part do hereby bargain, sell, convey, and confirm to the said parties of the second part and to their heirs and assigns an undivided one-fourth interest in and to all the lots, lands, and premises hereinbefore mentioned and describe- and to each and every part thereof; to have and to hold the same, with all and singular the tenements, hereditaments, privileges, and appurtenances thereunto belonging, together with the rent, use, and profit of the same, to the said parties of the second part and their heirs and assigns forever.

And the said Henry Suessenbach and Hugh McCaffrey, for themselves and their heirs, executors, and administrators, covenant and agree to and with the said parties of the second part and their assigns that at the time of the ensealing and delivery of these presents that they are well *siezed* of said premises in fee simple and

47 have good right, full power, and lawful authority to grant, bargain, and sell the same in the manner and form as aforesaid; that the same are free and clear of all liens and incumbrances whatever done or suffered by the said parties of the first part, except the taxes thereon, and that they will and do warrant and forever defend the title to the same to the said parties of the second part,

their heirs and assigns forever, against the claim or claims of all and every person whatsoever who claims said premises by, under, or through them.

In witness whereof the said parties of the first part set their hands and seals, at the city of Deadwood, D. T., this 10th day of August, A. D. 1882.

HUGH McCAFFREY. [SEAL.]
HENRY SUESSENBACH. [SEAL.]

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

On this 10th day of August, in the year of our Lord one thousand eight hundred and eighty-two, before me, James S. Mullaly, a notary public within and for said county, personally appeared Hugh McCaffrey and Henry Suessenbach, known to me to be the persons who are described in and who executed the within instrument, and who acknowledged to me that they executed the same.

In witness whereof I have hereunto set my hand and notarial seal the day and year last above written.

JAMES S. MULLALY,
[SEAL.] *Notary Public.*

(Endorsed:) Warranty deed. Hugh McCaffrey and Henry Suessenbach to Daniel McLaughlin and Wm. R. Steele. Territory of Dakota, county of Lawrence, *ss:* I hereby certify that this instrument was filed for record in my office at 2.10 o'clock p. m., Jan. 16, 1883, and is duly recorded in Book 26, page 447. J. S. Tracy, register of deeds, by Jno. McCarthy, deputy. Deadwood, D. T. August 10th, 1882.

48 To the introduction of each of said exhibits, "A," "B," "C," "D," "E," and "F," the defendant at the time objected, as the same was incompetent, immaterial, and irrelevant, and reserved the right to offer such proof as it is advised is essential in order to make the objections appear relevant, and also to state particularly the objection during the course of the trial.

The plaintiffs then called as a witness PETER L. ROGERS, who, being first duly sworn, testified as follows:

I reside in Deadwood and my business is surveying. I am city engineer of Deadwood. I am acquainted with the exterior boundaries of mineral claim No. 86, as patented, and I know where the premises in controversy, the First National bank, are; they are within claim 86. That lot is number two, in block three. The frontage of the lot occupied by the First National bank is twenty feet and it extends back near a hundred feet.

Plaintiffs next offered in evidence the depositions of Henry Suessenbach and Hugh McCaffrey, taken on the 5th day of November, 1886, before R. C. Hayes, notary public, filed in this court November 6th, 1886, which are as follows:

49 The deposition of HUGH MCCAFFREY is as follows:

"My name is Hugh McCaffrey; age, thirty-seven years; I am in the real-estate business; Omaha, Nebraska, is my present place of residence. I know the premises in controversy—lot 2, in block 3, in the city of Deadwood—being part of mineral claim No. 86, as platted by P. G. Ault, county surveyor, and filed for record in the register of deeds' office July 28th, 1882. I was acquainted with the same premises in the years 1878, 1879, and have been since. I lived in Deadwood in 1877, 1878—till July, 1879. Those premises in 1878 were worth at the lowest calculation $2,400.00 a year. It was worth about the same in 1879. In 1880 it would be very low at the same price. I should judge it would be about the same in 1881. It was about the same in 1882, 1883, 1884, 1885, and 1886 up to the present time. A banking business was carried on by the defendant down-stairs and there were offices and rooms upstairs. The defendant has used and occupied said premises since 1877. The defendant has withheld possession of the premises from the plaintiffs since July, 1878."

The witness HENRY SUESSENBACH'S deposition was as follows:

"My name is Henry Suessenbach; age, 47 years; occupation, manufacturer; residence, Omaha. I am one of the plaintiffs in this action. I know the premises in controversy in this action, being lot 2, in block 3, on the plat of mineral claim No. 86, in the town site of Deadwood, as surveyed and platted by P. G. Ault, county surveyor, and filed July 28th, 1882, in the register of deeds' office. I was acquainted with the same in 1878, 1879, and have been since. I
50 lived in the city of Deadwood from April, 1877, to October, 1879. In those years I was engaged in dealing in general merchandise and mining in the city of Deadwood. I know what the reasonable value of the use and occupation of the premises in controversy was in 1878. It was about $200.00 a month. In 1879 it was about the same. Before the fire in 1879 there was a two-story frame building upon the premises in controversy. After the fire I notified R. C. Lake against building on that lot, who was at that time an officer of the bank. I gave him a verbal notice. I called his attention to our title and asked him whether he intended to acquire title before rebuilding. He declined in general terms to enter into any negotiations. The reasonable value of the use and occupation of the premises in 1880, 1881, 1882, 1883, 1884, 1885, and in 1886 to the present time was $200.00 a month. A banking business has been carried on by the defendant since April 1st, 1877, I think. The defendant has withheld possession of said premises from me and my coplaintiffs since July 16th, 1878. The withholding was absolute. We were entirely excluded."

FRANK WELCH was next called as a witness and sworn on the part of the plaintiffs and testified as follows:

"In 1879 I resided in Deadwood. I knew a man named Edward Welch in 1878. He was my brother. He died in April, 1878.

Edward Welch left two brothers, a sister, mother, and another brother's wife. Their names were Mary Welch, Samuel Welch, Mary E. Franklin, Lydia A. Welch, and Frank Welch. He left no wife or children. I know where the premises occupied by the First National bank are, and have since the spring of 1878. I had something to do with the buying and selling of real estate and the hiring and letting of real estate during the years I was living in
51 Deadwood. The reasonable value of the use and occupation of the premises was probably two hundred dollars a month in 1878. The latter part of 1879 it was worth more than that; probably two hundred and twenty-five dollars a month. In 1880 I suppose it was worth about two hundred and twenty-five dollars a month. Since 1881 I don't suppose it has varied much. In 1882 it was worth about the same. Since 1883 I have not lived in Deadwood. R. C. Lake was president of the First National bank in the fall of 1879, at the time of the fire. Before his death Edward Welch was living on that part of claim 86 which is situated on Lee street. He was keeping hotel and dealing in mining stock and mines. Suessenbach and McCaffrey were in the wholesale liquor and cigar business, about one hundred feet from the corner of Lee and Main street. They were boarding on Lee street. They slept and did business on Main street, on a part of mineral claim No. 86. Edward Welch, Henry Suessenbach, and Hugh McCaffrey were carrying on mining on this claim in the spring of 1878. They were drifting—placer mining. I was in the drift. They were drifting from a point back of Ben. Baer's building, across Main street, under the Northwestern building."

On cross-examination the witness testified:

I came to Deadwood in February, 1878. At that time there was a frame building two stories high on the lot in controversy until the fire in September, 1879. While they were rebuilding I don't suppose the value of the use and occupation of the lot ought to be rated quite as high. The drift I speak of started under Ben. Baer's old place, on the easterly side of Main street. When I came here in 1878 the sign on the bank on the lot was Stebbins, Post and Wood—W. R. Stebbins, Samuel N. Wood, and M. E. Post.

52 WILLIAM L. HAMILTON was next sworn on the part of the plaintiffs and testified as follows:

I reside in Deadwood, in this county. My business is an attorney at this bar, practicing law. My office is in the First National bank building, upstairs. It is on the westerly side of Main street, on the corner of Lee and Main. I occupy two rooms. The next room to us is occupied for a sleeping-room. The remainder of the second story is occupied by the law firm of Van Cise & Wilson. They occupy three rooms of the second story. They occupy two rooms below, in the rear end of the bank. The front of the building is occupied by the bank—the defendant bank.

EDWIN VAN CISE was next sworn on the part of the plaintiffs and testified as follows:

I am an attorney-at-law. I have resided in Deadwood since the spring of 1879. Our offices are in the National bank building, in Deadwood, on Main and Lee streets. We occupy two rooms at the rear end of the building down-stairs and the two rooms immediately above those upstairs, and then one adjoining the two on the second story, five rooms altogether. We have occupied the two rooms down-stairs since early in 1880, I think; the two upstairs over them since the fall or winter of 1881, and the fifth room we have only occupied since the first part of 1886 or the latter part of 1885. The present building was erected, I think, in the winter of 1879 and 1880. Messrs. Hamilton & Rice occupy the two front rooms on the second floor, and some one occupies the room immediately adjoining them as a sleeping-room. The First National bank occupies the balance of the building on the first floor.

53 DONALD A. MCPHERSON was next sworn on the part of the plaintiffs and testified as follows:

"I reside in Deadwood. I am cashier of the defendant, The First National Bank. In 1879 R. C. Lake was president of said bank. He was elected president in the summer of 1879, before the fire. He was president until January, 1883. Mr. Hamilton occupies the two front rooms of the First National bank building. I have forgotten the name of the tenant of the next room. Messrs. Van Cise & Wilson occupy the three rear rooms upstairs and the two rooms below back of the bank. The banking offices occupy the remainder of the building, which consists of the main banking-room and the directors' room. The building is situated on the corner of Lee and Main street-. It is in the center of business."

On cross-examination the witness testified:

"The bank is occupying the building under claim of ownership, and has since 1878, when it was organized. During all that time they have held it as owners under claim of title."

ALVIN FOX, sworn on the part of plaintiff-, testified as follows:

"I reside in the city of Deadwood. My business in banking. I have resided in Deadwood over nine years, and during that time I have been engaged in letting and renting real property in Deadwood. I know where the First National bank building is. It is on the corner of Lee and Main streets, in the business center of town. The reasonable value of the use and occupation per annum since the month of July, 1878, of the premises would be twenty-four or twenty-five hundred dollars."

On cross-examination the witness testified:

54 "The banks are apt to concentrate business in that locality. I should not consider the property would be as valuable if the banks were down on the other corner as it is now."

JOHN A. GASTON, sworn on the part of the plaintiff-, testified as follows:

"I have resided in Deadwood pretty nearly eleven years. For the last seven or eight years I have been in the brokerage business and real estate. I have had something to do with the buying and selling of real estate and rental and hiring of real estate during that time in connection with my business. I am acquainted somewhat with the reasonable value of the use and occupation of premises in Deadwood. I know where the First National bank is. I think a man could afford to pay fifteen hundred dollars a year and re-lease it out and make a little something on it. Without reference to insurance and taxes, perhaps that place coul*s* be rented for eighteen hundred or two thousand dollars a year, but if a man had to pay insurance he hadn't ought to pay over fifteen hundred dollars and then re-lease it out."

On cross-examination the witness testified:

"I should think that building without the lot was worth about six thousand dollars. The lot is worth about four thousand dollars. Preceding the erection of the brick building there was a wooden building."

Plaintiffs here rested their case.

55 *Defense.*

Defendant offered in evidence an exemplified copy of the proceedings under which the plaintiffs' patent was acquired from the office of the Commissioner of the General Office, at Washington, under date January 19th, 1884, which is in the words and figures following, to wit, and which is marked Exhibit "G:"

56 (EXHIBIT "G.")

"N." H. F. C.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 19, 1884.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of certified copy of the amended notice of location, of abstract of title, of application for patent, of proof of publication and printed notice thereto attached, of proof of posting notice and diagram of claim, of proof that plat and notice remained posted on claim during notice of publication, of register's certificate of posting notice for sixty days and printed notice thereto

attached, of statement of fees and charges, of affidavit of $500 improvements, of proof that no known veins exist, of certificate that no suit — pending, of affidavits of citizenship of Henry Suessenbach, Frank T. Sutherland, Hugh McCaffrey, and Frank Welch, of copy of letters of administration of Frank Welch, of field-notes of survey, of application to purchase, of register's final certificate of entry, of receiver's receipt, and of protest of John A. Nye *et al.* is a true and literal exemplification of the said papers on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. C. McFARLAND,
[SEAL.] *Commissioner of the General Land Office.*

57 Notice is hereby given that the undersigned, for the purpose of more clearly defining the boundaries of placer claim No. 15 above discovery, on Whitewood placer mining district, Lawrence county, Dakota Territory, do, on this the 28th day of January, A. D. 1878, file this our amended certificate and described more particularly as per survey of the annexed field-notes.

EDWARD WELCH.
FRANK T. SUTHERLAND.
HUGH McCAFFREY.
HENRY SUESSENBACH.

Description and field-notes of survey of the placer claim No. 15, above discovery, on Whitewood placer mining district, Lawrence county, Dakota Territory, surveyed by Henry C. Rohleder January 18th, 1878.

Commencing at the northwest corner of the claim, a rock set in the ground, from which locating monument No. 1 bears S. 26° 30 W., var. 15° E., and runs, 1st course, N. 32° E., var. 15° E., on William street, Deadwood, 110 feet to corner No. 2, the same being corner No. 1, lot No. 76; thence, 2nd course, S. 59° 15′ E., var. 15° E., along west line of lot No. 76 723 feet to a post 4 in. sq., marked W. 4, M. C. 76; also marked No. 3 for this claim; thence, 3rd course, S. 14° 15′ W., var. 15° E., along slope of hill 230 feet to corner No. 4, a post in mound of stone in rear of post office, South Deadwood; thence, 4th course, N. 66° 30′ W., var. 15° E., at 387 feet to corner No. 5, a post 4 in. sq; thence, 5th course, N. 25° 15′ E., var. 15° E., along east line of claim No. 25 below discovery, Lost mining
58 district, at 66 ft. to corner No. 6; thence, 6th course, north 26° west along Lee street on northeast line of claim No. 25, Lost mining district, 409 feet to corner No. 1 and place of beginning, containing an area of 3.46 acres.

TERRITORY OF DAKOTA, }
County of Lawrence. }

I, C. H. McKinnis, register of deeds in and for said county, in the Territory aforesaid, do hereby certify that the within and foregoing is a true and correct copy of the original filed for record in this office at 2.40 p. m. o'clock on the 29th day of January, 1878, and duly recorded in Book "B" of Miscellaneous Records, on page 324.

Given under my hand and official seal this 15th day of May, A. D. 1878.

C. H. McKINNIS,
Register of Deeds.

[SEAL.] By C. E. HAURAHAN, *Dept.*

"N." 55992, "N." 11. Placer claim 15. Amended certificate of location. Lot No. 86. U. S. land office at Deadwood, Dakota. Filed this 15th day of May, A. D. 1878. A. S. Stewart, register.

59 *Abstract of Title of Placer Claim Number Fifteen (15) Above Discovery, Whitewood Placer Mining District, Lawrence County, Dakota Territory.*

Grantors.	Grantees.	Residence.	Instrument.	Date of instrument.	Date of acknowledgement.	Date of filing.	Record.	Consideration.	Remarks.
Edward Welch, Frank T. Sutherland, Hugh McCaffrey, Henry Suessenbach	Relocators	Lawrence Co.	Certf. & survey.	1878. Jan'y 28.		1878. Jan'y 29.	"B," 324		Amended location certificate, with field-notes of survey attached.
F. T. Sutherland, H. F. Lake	Edward Welch, Hugh McCaffrey	"	Deed	1877. July 25.	1877. July 25.	1877. July 25.		20 00	An undivided $\frac{1}{3}$ interest.
"	Henry Suessenbach	"	Deed	1878. Jan'y 5.	1878. Jan'y 5.	1878. Jan'y 17.	F, 152	10 00	An undivided $\frac{1}{3}$ interest.

TERRITORY OF DAKOTA, *County of Lawrence,* } ss:

Seal Lawrence County, Dakota Territory.

I, C. H. McKinnis, register of deeds in and for said county, in the Territory aforesaid, do hereby certify that the above and foregoing is a true and correct abstract according to the records of this office.

Given under my hand and official seal this the 14th day of May, A. D. 1878.

C. H. McKINNIS,
Register of Deeds.

60 *Abstract of Title of Claim No. 15.*

Claim No. 15 above discovery was located January 19th, A. D. 1876, by F. H. Wilkins. See Book A, page 36. Aug. 19, 1876. One-half interest re-located by Ed. Durham, N. Seiver, Thos. Clifton, and Wm. More. See Book A, page 69. March 22, 1876. Contract to transfer for work to J. A. Hamilton, if filled. See Book A, page 99. July 11, 1886. Bill of sale from W. A. Gamble and J. Stein to T. Clifton and W. Moore of one-half interest. See Book A, page 151. March 15, 1887. Re-located by J. H. McCutchen. See Book A, page 216. March 16, 1877. Re-located by N. Sevier, E. Dyrham, Thos. Clifton, and Wm. Moore. See page 216. June 26, 1877. Bill of sale from N. Seiver, E. Durham, Thos. Clifton, Wm. Moore to F. T. Sutherland, Henry Lake, and J. J. Sutherland. Page 257. July 25, 1877. Bill of sale of ⅓ *one-third* interest from J. J. Sutherland to F. T. Sutherland.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

James J. Sutherland, being duly sworn, deposes and says that he is the recorder of Whitewood placer mining district, in the county of Lawrence and Territory of Dakota; that the foregoing is a true and correct abstract of the title to placer claim No. 15th above discovery, in said Whitewood district, showing the locator of said claim and all transfers now on file and recorded with said affiant up to date.

JAMES J. SUTHERLAND.

Subscribed and sworn to before me this 15th day of May, A. D. 1878.

A. W. HASTIE, [SEAL.]
Notary Public.

61 N. 55992, N. 10. Abstract of title. Land office at Deadwood, Dakota. Filed May 15th, 1878. A. S. Stewart, register.

62 *Application for Patent.*

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Application for patent for the mining claim.

To the register and receiver of the U. S. land office at Deadwood:

Frank T. Sutherland, being duly sworn according to law, deposes and says that in virtue of a compliance with the mining rules, regulations, and customs by himself, the said Frank T. Sutherland, and his co-claimants, E. Welch, deceased, by Frank Welch, administrator of the estate, Hugh McCaffrey and Henry Suessenbach, ap-

plicants for patents herein, have become the owners of and are in the actual, quiet, and undisturbed possession of placer claim No. 15 above discovery, on Whitewood creek, bearing gold, together with surface ground $3\frac{47}{100}$, three $\frac{47}{100}$, acres for the convenient working thereof as allowed by the local rules and customs of miners, said mineral claim and surface ground being situated in the Whitewood mining district, county of Lawrence and Dakota Territory, and being more particularly set forth and described in the official field-notes of survey thereof hereto attached, dated the 15th day of February, A. D. 1878, and in the official plat of said survey now posted conspicuously on said mining claim or premises, a copy of which is filed herewith.

Deponent further states that the facts relative to the right of possession of himself and his co-claimants hereinbefore named to said mining claim, vein, lode, or deposit and surface ground so surveyed and platted are substantially as follows, to wit, by purchase and relocation, which will more fully appear by reference to the
63 copy of the original record of location and the abstract of title hereto attached and made part of this affidavit, the value of the labor done and improvements made upon said placer claim by himself and his grantors being equal to the sum of five hundred dollars in gold coin of the United States. In consideration of which facts and in conformity with the provisions of the act of Congress approved May 10th, 1872, entitled "An act to promote the development of the mining resources of the United States," application is hereby made for and in behalf of said Frank T. Sutherland, E. Welch, deceased, by Frank Welch, administrator of the estate; Hugh McCaffrey, and Henry Sussenbach for a patent from the Government of the United States for the said placer mining claim, deposit, and the surface ground so officially surveyed and platted.

FRANK T. SUTHERLAND.

Subscribed and sworn to before me this fifteenth day of May, A. D. 1876; and I hereby certify that I consider the above deponent a credible and reliable person, and that the foregoing affidavit to which was attached the field-notes of survey of the lot No. 86, placer mining claim, was read and examined by him before his signature was affixed thereto and the oath made by him.

HENRY C. ROHLEDER,
[SEAL.] *Notary Public.* [SEAL.]

64 N. 55992, N. 9, Form C. U. S. mining act, May 10, 1872. Application for patent for placer mining claim. Lot No. 86. Frank T. Sutherland, applicant. May the 15th, A. D. 1878. U. S. land office at Deadwood, Dakota. Filed May the 15th, 1878. A. S. Stewart, register.

65 *Proof of Publication.*

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

A. W. Merrick, being first duly sworn, deposes and says that he is the publisher of the Black Hills Daily Pioneer, a newspaper published at Deadwood, in Lawrence county, in the Territory of Dakota; that the notice of the application for a patent for the No. 15 above discovery on Whitewood Creek placer mining claim, of which a copy is hereto attached, was first published in said newspaper in its issue dated the sixteenth of May, 1878, and was published in each daily issue of said newspaper for sixty consecutive days thereafter, the full period of sixty days, the last publication thereof being in the issue dated the sixteenth of July, 1878.

A. W. MERRICK.

Subscribed and sworn to before me this 16th day od July, A. D. 1878.

[SEAL.] HENRY C. ROHLEDER,
Notary Public.

N. 55992, N. 8. Form H. U. S. mining act, May 10, 1872. Proof of publication. Lot No. 86. U. S. land office at Deadwood, Dakota. Filed the 16th day of July, A. D. 1878. A. S. Stewart, register.

66 *Notice No.* 31.

Application for a patent.

U. S. LAND OFFICE,
DEADWOOD, DAKOTA, *May the* 15*th*, 1878.

Notice is hereby given that E. Welch, deceased, by Frank Welch, administrator; Frank T. Sutherland, Hugh McCaffrey, and Henry Suessenbach, whose post-office address is Deadwood, Lawrence county, Dakota Territory, have this day filed their application for a patent for No. 15 above discovery on Whitewood Creek placer ground, bearing gold, with surface ground, situate, lying, and being in Whitewood placer mining district, county of Lawrence and Territory of Dakota, and known and designated by the field-notes and official plat on file in this office as lot number 86. The exterior boundaries of said lot No. 86 are as follows, to wit, variation 15 east: Commencing at a sandstone 4 x 8 x 16 inches, marked No. 1 on one side and M. C. 86 on the opposite side, for corner No. 1, and running thence north 31° east 110 feet to corner No. 2, the same being corner No. 1, lot No. 76, and from which corner locating monument No. 1 bears south 3° 48′ west 1,984 feet distant; thence south 59° 15′ east 723 feet to corner No. 3, the same being corner No. 4, lot No. 76; thence south 14° 15′ west 230 feet to corner No. 4; thence north 66° 49′ west 387 feet to corner No. 5; thence north 25° 15′ east 68 feet

to corner No. 6; thence north 46° west 409 feet to place of beginning, containing $3\frac{47}{100}$, three $\frac{47}{100}$, acres.

This claim is bounded by placer-claim lot No. 76 below and lot No. 72 and placer claim No. 16 above discovery.

The location of this mine is duly recorded in the recorder's office of Whitewood placer mining district, in Book A, pages 36, 69, 99, 151, 216, 257, and in the register of deeds' office, in
67 Book B, page 324, and Book F, page 152.

Any and all persons claiming adversely any portion of said placer claim or said mining ground as hereinbefore described are required to file their adverse claim with the register of the United States land office at Deadwood, in the Territory of Dakota, during the sixty days period of publication hereof or they will be barred by virtue of the provisions of the statute.

I direct that this notice be published for sixty days in the Black Hills Daily Pioneer.

A. S. STEWART, *Register.*

ROHLEDER & SMITH,
U. S. Dep. Min. Surveyors.

28, 2d601.

68 *Proof of Posting Notice and Diagram of the Claim.*

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

J. T. McKown and L. H. Flanders, each for himself and not one for the other, being first duly sworn according to law, deposes and says that he is a citizen of the United States over the age of twenty-one years and was present on the — day of May, A. D. 1878, when a plat representing the placer mining claim lot N. 86 and certified to as correct by the U. S. surveyor general of Dakota, together with a notice of the intention of E. Welch, by Frank Welch, administrator; Frank T. Sutherland, Hugh McCaffrey, and Henry Suessenbach to apply for a patent for the mining claim and premises so platted was posted on a conspicuous place upon said mining claim, to wit, upon in front of Welch, McCaffrey & Co.'s store on Main street, Deadwood, where the same could be easily seen and examined, the notice so conspicuously posted upon said claim being in words and figures as follows, to wit:

Legal Notice of the Application of E. Welch, by Frank Welch, Administrator; Frank T. Sutherland, Hugh McCaffrey, and Henry Suessenbach for a United States Patent.

Notice is hereby given that, in pursuance of the act of Congress, approved May 10, 1872, "To promote the developement of the mining resources of the United States," E. Welch, deceased, by Frank Welch, administrator; Frank T. Sutherland, Hugh McCaffrey, and H. Suessenbach, claiming placer claim No. 15 above discovery, on

Whitewood creek, bearing gold, with the surface ground lying and being situate within the Whitewood placer mining district,
69 county of Lawrence and Territory of Dakota, has made application to the United States for a patent for the said mining claim, which is more fully described as to metes and bounds by the official plat herewith posted, and by the field-notes of survey thereof now filed in the office of the register of the district of lands subject to sale, at Deadwood, which field-notes of survey describe the boundaries and extent of said claim on the surface, with magnetic variation at 15° east, as follows, to wit: Beginning at a sandstone 4 x 8 x 16 inches, marked No. 1 on one side and M. C. 86 on the opposite side, for corner No. 1 and running thence north 31° 110 feet to corner No. 2, the same being corner No. 1, lot No. 76, and from which corner locating monument No. 1 bears south 3° 48′ west 1,984 feet distant; thence south 59° 15′ east 723 feet to corner No. 3, the same being corner No. 4, lot No. 76; thence south 14° 15′ west 230 feet to corner No. 4; thence north 66° 49′ west 387 feet to corner No. 5; thence north 25° 15′ east 68 feet to corner No. 6; thence north 46° west 409 feet to the place of beginning, containing an area of 3.47 acres, the said mining claim being of record in the office of the recorder of deeds, at Deadwood, in the county and Territory aforesaid, the presumed general course or direction of the said placer claim or mineral deposit being shown upon the plat posted herewith as near as can be determined from present developments, together with the surface ground shown upon the official plat posted herewith, the said mining premises hereby sought to be patented being bounded by placer-claim lot No. 76 below and lot No. 72 and placer claim No. 16 above discovery above the said placer mining claim being designated as lot No. 86 in the official plat posted herewith.

70 Any and all persons claiming adversely the mining ground vein, lode, premises, or any portion thereof so described, surveyed, platted, and applied for are hereby notified that unless their adverse claims are duly filed according to law and the regulations thereunder within sixty days from the date hereof with the register of the U. S. land office at Deadwood, in the Territory of Dakota, they will be barred in virtue of the provisions of said statute.

(Sig.) FRANK J. SUTHERLAND.
FRANK WELCH,
Administ. of E. Welch.
HUGH McCAFFREY.
HENRY SUESSENBACH.

Dated on the ground this fifteenth day of May, A. D. 1878.

Witness:
Z. T. McKNOWN.
L. H. FLANDERS.

Subscribed and sworn to before me this fifteenth day of May, A. D. 1878, and I hereby certify that I consider the above deponents credible and reliable witnesses, and that the foregoing affidavit and

notice was read by each of them before their signatures were affixed thereto and the oath made by them.

HENRY C. ROHLEDER,
[SEAL.] *Notary Public.*

Form D. U. S. mining act, May 10, 1872. Proof of posting notice and diagram of claim. Lot No. 86. U. S. land office at Deadwood, Dakota. Filed this 15th day of May, A. D. 1878. A. S. Stewart, register.

71 *Proof that Plat and Notice Remained Posted on Claim During Time of Publication.*

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Henry Suessenbach, being first duly sworn according to law, deposes and says that he is claimant and co-owner with, &c., in the No. 15 above discovery placer mining claim, on Whitewood creek, in Whitewood placer mining district, Lawrence county, Dakota Territory, the official plat of which premises, together with the notice of intention to apply for a patent therefor, was posted thereon on the fifteenth day of May, A. D. 1878, as fully set forth and described in the affidavit of L. H. Flanders and L. S. McKown, dated the fifteenth day of May, A. D. 1878, which affidavit was duly filed in the office of the register, at Deadwood, in this case, and that the plat and notice so mentioned and described remained continuously and conspicuously posted upon said mining claim from the fifteenth day of May, A. D. 1878, until and including the sixteenth day of July, A. D. 1878, including the sixty days period during which notice of said application for patent was published in the newspaper.

HENRY SUESSENBACH.

Subscribed and sworn to before me this sixteenth day of July, A. D. 1878, and I hereby certify that the foregoing affidavit was read to the said Henry Suessenbach previous to his name being subscribed thereto, and that deponent is a respectable person, to whose affidavit full faith and credit should be given.

HENRY C. ROHLEDER,
Notary Public. [SEAL.]

72 *Register's Certificate of Posting Notice for Sixty Days.*

U. S. LAND OFFICE AT DEADWOOD,
DAKOTA, *July the* 16, 1878.

I hereby certify that the official plat of the placer mine No. 15 above discovery, Whitewood creek, lot No. 86, was filed in this office on the fifteenth day of May, A. D. 1878, and that the attached notice of the intention of E. Welch *Frank* by Frank Welch, administrator; T. Sutherland, Hugh McCaffrey, and Henry Suessenbach to apply

for a patent for the mining claim or premises embraced by said plat and described in the field-notes of survey thereof, filed in said application, was posted conspicuously in this office on the 16th day of May, A. D. 1878, and remained so posted until the 16th day of July, A. D. 1878, being the full period of sixty consecutive days as required by law; that said plat remained in this office during that time, subject to examination, and that no adverse claim thereto has been filed.

A. S. STEWART, *Register.*

The notice posted in the office should be attached to this certificate.

"N." 55992, "N." 4. Form F. U. S. mining act, May 10, 1872. Register's certificate of posting notice for sixty days. Lot No. 86. U. S. land office at Deadwood, Dakota, July the 16th, 1878.

73 *Notice No.* 31.

Application for a patent.

U. S. LAND OFFICE,
DEADWOOD, DAKOTA, *May the 15th*, 1878.

Notice is hereby given that E. Welch, deceased, by Frank Welch, administrator; Frank T. Sutherland, Hugh McCaffrey, and Henry Suessenbach, whose post-office address is Deadwood, Lawrence county, Dakota Territory, have this day filed their application for a patent for No. 15 above discovery, on Whitewood Creek placer ground, bearing gold, with surface ground situate, lying, and being in Whitewood placer mining district, county of Lawrence and Territory of Dakota, and known and designated by the field-notes and official plat on file in this office as lot number 86, the exterior boundaries of said lot No. 86 being as follows, to wit, variation 15° east: Commencing at a sandstone 4 x 8 x 16 inches, marked No. 1 on one side and M. C. 86 on the opposite side, for corner No. 1, and running thence north 31° east 110 feet to corner No. 2, the same being corner No. 1, lot No. 76, and from which corner locating monument No. 1 bears south 3° 48′ west 1,984 feet distant; thence south 59° 15′ east 723 feet to corner No. 3, the same being corner No. 4, lot No. 76; thence south 14° 15′ west 230 feet to corner No. 4; thence north 66° 49′ west 387 feet to corner No. 5; thence north 25° 15′ east 68 feet to corner No. 6; thence north 46° west 409 feet to place of beginning, containing $3\frac{47}{100}$, three $\frac{47}{100}$, acres.

This claim is bounded by placer-claim lot No. 76 below and lot No. 72 and placer claim No. 16 above discovery.

The location of this mine is duly recorded in the recorder's office of Whitewood placer mining district, in Book A, pages 36,
74 69, 99, 151, 216, 257, and in the register of deeds' office, in Book B, page 324, and Book F, page 152.

Any and all persons claiming adversely any portion of said placer mine or said mining ground, as hereinbefore described, are required to file their adverse claim with the register of the United States

land office at Deadwood, in the Territory of Dakota, during the sixty days period of publication hereof, or they will be barred by virtue of the provisions of the statute.

I direct that this notice shall be published for sixty days in the Black Hills Daily Pioneer.

A. S. STEWART, *Register.*

ROHLEDER & SMITH,
U. S. Dep. Min. Surveyors.

28 2D6o t

75 *Statement of Fees and Charges.*

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Henry Suessenbach, being first duly sworn according to law, deposes and says that he is the applicant for patent to the No. 15 above discovery placer mining claim, in Whitewood placer mining district, county of Lawrence, Territory of Dakota, under the provisions of chapter VI of title XXXII of the Revised Statutes of the United States, and that in the prosecution of said application he has paid out the following amounts, viz: To the credit of the surveyor general's office, thirty dollars; for surveying, fifty dollars; for filing in the local land office, ten dollars; for publication of notice, thirty dollars; and for the land embraced in his claim, ten dollars.

HENRY SUESSENBACH.

Subscribed and sworn to before me this sixteenth day of July, A. D. 1878.

HENRY C. ROHLEDER,
[SEAL.] *Notary Public.* [SEAL.]

"N." 55992, "N." 7. U. S. mining act, May 10, 1872. Statement of fees and charges. Lot No. 86. U. S. land office at Deadwood, Dakota. Filed the 16th day of July, A. D. 1878. A. S. Stewart, register.

76 *Affidavit of Five Hundred Dollars Improvements.*

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

George Atchinson and George Stokes, of lawful age, being first duly sworn according to law, depose and say that they are acquainted with the No. 15 above discovery placer mining claim, in Whitewood mining district, county and Territory aforesaid, for which E. Welch, F. T. Sutherland, H. McCaffrey, *et al.* have made application for patent under the provisions of the act of Congress approved May 10, 1872, and that the labor done and improvements made thereon by the applicants and their grantors exceed five hundred dollars in value.

GEORGE ATCHINSON.
GEORGE STOKES.

6—68

Subscribed and sworn to before me this fifteenth day of February, A. D. 1878.

H. H. MUND,
[SEAL.] *Notary Public.*

"N." 55992, "N." 13. Affidavit of five hundred dollars' worth of improvements. Lot No. 86. U. S. land office at Deadwood, Dakota. Filed this 15th day of May, A. D. 1878. A. S. Stewart, register.

77 *Proof that No Known Veins Exist in a Placer Mining Claim.*

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

James J. Sutherland and Wade Porter, of the said county and State, being first duly sworn, each for himself deposes and says that he is well acquainted with the lot No. 86 placer mining claim, embracing 3.47 (three $\frac{47}{100}$) acres, known as claim No. 15 above discovery, on Whitewood creek, situated in the Whitewood placer mining district, in the county of Lawrence and Territory of Dakota, owned and worked by E. Welch, F. T. Sutherland, H. McCaffrey, and H. Suessenbach, applicants for United States patent; that since January, 1876, he has resided near and often been upon the said mining premises, and that no known vein or veins of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, exist on said moning claim or any part thereof, so far as he knows, and he verily believes that none exist thereon; and, further, that he has no interest whatever in the said placer mine of Welch, Sutherland, McCaffrey, and Suessenbach.

JAMES J. SUTHERLAND.
WADE PORTER.

Subscribed and sworn to before me this fifteenth day of May, A. D. 1878.

HENRY C. ROHLEDER,
[SEAL.] *Notary Public.*

78 "N." 55992, "N." 15. Affidavit that no known vein exists. James J. Sutherland and Wade Porter. Lot No. 86. U. S. land office at Deadwood, Dakota. Filed this 15th day of May, A. D. 1878. A. S. Stewart, register.

79 *Certificate that No Suit is Pending.*

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

I, A. R. Z. Dawson, clerk of the district court in and for Lawrence county, Dakota Territory, do hereby certify that there is now no suit or action of any character pending in said court involving the right of possession to any portion of the No. 15 above discovery, on Whitewood Creek placer mining claim, applied for by E. Welch,

Frank T. Sutherland, Hugh McCaffrey, Henry Suessenbach, and that there has been no litigation before said court affecting the title to said claim or any part thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Deadwood, this seventeenth day of July, A. D. 1878.

A. R. Z. DAWSON, [SEAL.]
[SEAL.] *Clerk of the District Court of Lawrence County,*
1st Judicial District, Ter. of Dakota.

"N." 55992, "N." 6. Form M. U. S. mining act, May 10, 1872. U. S. land office. Lot No. 86. Certificate that no suit is pending. U. S. land office at Deadwood, Dakota. Filed the 16th day of July, A. D. 1878. A. S. Stewart, register.

80 *Affidavit of Citizenship.*

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Henry Suessenbach, being first duly sworn according to law, deposes and says that he is one of the applicant- for patent for lot No. 86, placer mining claim, situate in Whitewood placer mining district, county of Lawrence; that he has declared his intention to become a citizen of the United States *the* at Omaha, Douglas county, State of Nebraska, on the 25th Sept., in the year 1869, and is now a resident at Deadwood, Lawrence county, D. T.

HENRY SUESSENBACH.

Subscribed and sworn to before me this fifteenth day of May, A. D. 1878.

HENRY C. ROHLEDER,
[SEAL.] *Notary Public.* [SEAL.]

"N." 55992, "N." 19. Affidavit of citizenship. Henry Suessenbach. Lot No. 86. U. S. land office at Deadwood, Dakota. Filed this 15th day of May, A. D. 1878. A. S. Stewart, register.

81 *Affidavit of Citizenship.*

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Frank T. Sutherland, being first duly sworn according to law, deposes and says that he is one of the applicants for patent for lot No. 86, placer mining claim, situate in Whitewood placer mining district, county of Lawrence; that he is a native citizen of the United States, born in the county of Brown, State of Wisconsin, in the year 1855, and is now a resident at Deadwood, Lawrence county, D. T.

FRANK T. SUTHERLAND.

Subscribed and sworn to before me this fifteenth day of May, A. D. 1878.

HENRY C. ROHLEDER, [SEAL.]
Notary Public.

Affidavit of citizenship. Frank T. Sutherland. Lot No. 86. U. S. land office at Deadwood, Dakota. Filed this 15th day of May, A. D. 1878. A. S. Stewart, register.

82 *Affidavit of Citizenship.*

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Hugh McCaffrey, being first duly sworn according to law, deposes and says that he is one of the applicants for patent for lot No. 86, placer mining claim, situate in Whitewood placer mining district, county of Lawrence; that he has declared his intention to become a citizen of the United States, at Omaha, Douglas county, State of Nebraska, on the —, in the year 1870, and is now a resident at Deadwood, Lawrence county, D. T.

HUGH McCAFFREY.

Subscribed and sworn to before me this fifteenth day of May, A. D. 1878.

HENRY C. ROHLEDER, [SEAL.]
[SEAL.] *Notary Public.*

"N." 55992, "N." 20. Affidavit of citizenship. Henry McCaffrey. Lot No. 86. U. S. land office at Deadwood, Dakota. Filed this 15th day of May, A. D. 1878. A. S. Stewart, register.

83 *Affidavit of Citizenship.*

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Frank Welch, administrator of the estate of E. Welch, deceased, being first duly sworn according to law, deposes and says that he is one of the applicants for patent for lot No. 86, placer mining claim, situate in Whitewood placer mining district, county of Lawrence; that he is a native citizen of the United States, born in the county of Lincoln, State of Maine, in the year 1849, and is now a resident at Deadwood, Lawrence county, D. T.

FRANK WELCH,
Administrator for the Estate of E. Welch.

Subscribed and sworn to before me this fifteenth day of May, A. D. 1878.

HENRY C. ROHLEDER,
[SEAL.] *Notary Public.* [SEAL.]

"N." 55992, "N." 16. Affidavit of citizenship. Frank Welch, administrator for the estate of E. Welch. Lot No. 86. U. S. land office at Deadwood, Dakota. Filed this 15th day of May, A. D. 1878. A. S. Stewart, register.

84 TERRITORY OF DAKOTA, } ss.
County of Lawrence, }

In Probate Court of said County.

In Re Estate of EDWARD WELCH, Deceased.

Frank Welch is hereby appointed administrator of the estate of Edward Welch, deceased.

Witness John R. Fraser, judge of the probate court of the county of Lawrence, with the seal thereof affixed, the first day of May, A. D. 1878.

[Seal of Probate Court.]

JOHN R. FRASER,
Probate Judge.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

I, Frank Welch, do solemnly swear that I will honestly and impartially perform, according to law, my duties as administrator of the estate of Edward Welch, deceased.

So help me God.

FRANK WELCH.

Subscribed and sworn to before me this first day of May, A. D. 1878.

JOHN R. FRASER,
Probate Judge.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

I, John R. Fraser, judge of probate, do hereby certify that the foregoing is a true and correct copy of the original letters now on file in my office.

85 Witness my hand and the seal of the probate court affixed the 17th day of May, A. D. 1878.

JOHN R. FRASER,
[SEAL.] *Probate Judge.*

Letters of administration of Frank Welch on the estate of Ed. Welch, deceased. Lot No. 86.

86 *Survey No. 86.*

Field-notes of the survey of E. Welch, F. T. Sutherland, H. McCaffrey, *et al.*, claim upon the No. 15 above discovery placer, in Whitewood mining district, Lawrence county, Dakota.

Surveyed by Henry C. Rohleder, deputy mineral surveyor.
Order dated February 5th, 1878.
Survey commenced February 15th, 1878.
Survey completed February 15th, 1878.

U. S. LAND OFFICE AT DEADWOOD, DAKOTA.

Filed this 15th day of May, A. D. 1878.

A. S. STEWART, *Register.*

87 Placer claim, lot No. 86.

Feet.

Survey commenced February 15th, 1878; executed with a surveyor's transit.

Beginning at a stone marked on the top with an "x" and set there for the northwest corner of placer claim No. 25 below discovery, Lost mining district, and which is the southwest corner of this survey, lot No. 86, claim No. 15 above discovery, Whitewood mining district. The stone found could not be marked; set a sandstone 4 x 8 x 16 inches alongside the other; marked it "No. 1" on one side and "M. C. 86" on the opposite side for corner No. 1, from which corner the southeast corner of Hoffman's dwelling bears north 69° 40′ west 25 feet distant.

NOTE.—This corner is situated about the center of William street, Deadwood city.

(Placer claim, lot No. 86.)

From the corner so established and marked I run, 1st course, north 31° east, var. 15° east, along William street—

110 to a post 4 inches square set firmly in the ground; found it marked "No. 1" on one side and "M. C. 76" on the opposite side; also marked it "No. 2" on one side and "M. C. 86" on the opposite side for corner No. 2 of this survey, from which corner U. S. locating monument No. 1 bears south 3° 48°

88 west 1,984 feet distant; thence, 2nd course, south 59° 15′ east, var. 15° east, along southwest boundary of lot No. 76—

673 cross Whitewood creek course northeast (placer claim lot No. 86)—

723 to a post 4 inches square in mound of stone; found it marked No. 4 on one side and "M. C. 76" on the opposite side; also marked it "No. 3" on one side and M. C. 86 on opposite side for corner No. 3 of this survey; thence, third course, south 14° 15′ west, var. 15° east, along slope of ridge—

230 to a post 4 inches square in mound of stone in the rear of Deadwood post office; marked it "No. 4" on one side and "M. C. 86" on the opposite side for corner No. 4; thence, 4th course, north 66° 49′ wes-, var. 15° east—

50 cross Whitewood creek course northeast (placer claim lot No. 86)—

387 a post 4 inches square at a point on the south boundary line of claims Nos. 24 and 25 below discovery, in Lost mining district; marked it "No. 5" on one side and "M. C. 86" on the opposite side for corner No. 5, from which corner corner No. 1 of lot No. 71 bears south 25 15 west 451 feet distant; thence, 5th course, north 25° 15′ east, var. 15° east, along southern boundary of claims Nos. 24 & 25, Lost mining district—

68 set a sandstone 6 x 8 x 18 inches; marked it "No. 6" on one side and "M. C. 86" on opposite side for corner No. 6 at the

89 northwest corner of the building known as the "Occidental chop-house," on Lee street, Deadwood city; thence (placer claim, lot No. 86), 6th course, north 46° west, var. 15′ east, along Lee street and boundary line between Lost and Whitewood mining districts—

100 cross Main street, Deadwood—

150 cross covered ditch north—

297 offset south 44° west 25 feet; thence north 46° west 75 on offset line; thence north 44° east 25 feet to—

372 a point on the line on William street, Deadwood; thence on true line at—

409 to corner No. 1 and place of beginning, containing an area of 3.47 acres.

February 15th, 1878.

90 *Report of Mine and Improvements.*

This mine is a deposit of gravel in which free gold is found. The gravel bed is from 10 to 12 feet deep and said to be very rich.

This mine is located on Whitewood creek, where the middle part of Deadwood is now situated.

The improvements consist of one shaft 20 feet deep, a drain or tunnel 200 feet long, one pump and wheel, flume, ditch, windlass, track, and car, valued at over $500.00, as is shown by the affidavits of George Atchinson and George Stokes filed herewith.

(Signed) HENRY C. ROHLEDER,
U. S. Deputy Mineral Surveyor.

91 Placer claim lot No. 86.

List of names of individuals employed to assist in running, measuring, and marking the line or corners described in the foregoing field-notes of E. Welch, F. T. Sutherland, H. McCaffrey, *et al.* claim upon the No. 15 above discovery placer, in Whitewood mining district, Lawrence county, Dakota:

Zac. F. Duvall.
Granville Turner.

We hereby certify that we assisted Henry C. Rohleder, U. S. deputy mineral surveyor, in surveying the exterior boundaries and marking the corners of E. Welch *et al.* claim upon the No. 15 above discovery placer, in Whitewood mining district, Lawrence county, Dakota, and that said survey has been in all respects, to the best of our knowledge and belief, well and faithfully surveyed and the boundary monuments planted according to the instructions furnished by the surveyor general.

(Signed) ZAC. T. DUVALL.
(Signed) GRANVILLE TURNER.

Subscribed and sworn to by the above-named persons before me this 20th day of February, 1878.

(Signed) HENRY C. ROHLEDER,
[SEAL.] *Notary Public.*

92 Placer claim lot No. 86.

Affidavit.

I, Henry C. Rohleder, deputy U. S. mineral surveyor, do solemnly swear that in pursuance of an order from Henry Esperson, surveyor general of the public lands in the Territory of Dakota, bearing date the 5th day of February, 1878, and in strict conformity to the laws of the United States and the instructions furnished by said surveyor general, I have faithfully surveyed the E. Welch, F. T. Sutherland, H. McCaffrey, *et al.* claim upon the No. 15 above discovery placer, in Whitewood mining district, Lawrence county, Dakota, and do further solemnly swear that the foregoing are the true and original field-notes of such survey.

(Signed) HENRY C. ROHLEDER,
U. S. Deputy Mineral Surveyor.

Subscribed by said Henry C. Rohleder, U. S. deputy mineral surveyor, and sworn to before me this 20th day of February, 1878.

(Signed) H. H. MUND,
[SEAL.] *Notary Public.*

SURVEYOR GENERAL'S OFFICE,
YANKTON, DAKOTA, *May 6th*, 1878.

The foregoing field-notes of the survey of E. Welch, F. T. Sutherland, *et al.* claim upon the No. 15 above discovery, in Whitewood mining district, Lawrence county, Dakota, surveyed by Henry C. Rohleder, U. S. deputy mineral surveyor, having been critically examined, the necessary corrections made, the said field-notes and the surveys they describe are hereby approved.

(Signed) HENRY ESPERSON,
Surveyor General of Dakota.

93 *Certificate.*

I hereby certify that the foregoing transcript of the field-notes of the survey of placer claim lot No. 86, in Whitewood mining district,

Lawrence county, Dakota Territory, has been correctly copied from the original notes of said survey on file in this office; that said field-notes furnish such an accurate description of said mining claim as will, if incorporated into a patent, serve fully to identify the premises, and that such reference is made therein to natural objects and permanent monuments as will perpetuate and fix the location thereof.

I further certify that value of the labor and improvements upon said mining claim by the applicants for patent and their grantors is not less than five hundred dollars, $500.00, consisting of one shaft 20 feet deep, a drain or tunnel 200 feet long, one pump and wheel, flume, ditch, windlass, track, and car, and that the plat thereof filed with the U. S. land office at Deadwood, Lawrence county, D. T., is correct and in conformity with the foregoing field-notes.

U. S. surveyor general's office, Yankton, Dakota, May 6th, 1878.

HENRY ESPERSON,
U. S. Surveyor Gen'l for Dakota.

94 *Application to Purchase.*

To the register and receiver U. S. land office at Deadwood, Dakota Territory:

Mineral entry No. —, lot No. —.

The undersigned, applicants under the laws of Congress for a patent for what is known as the No. 15 above discovery placer mining claim, embracing (3.47) three and forty-seven hundredths acres of surface ground, the same being designated by the U. S. surveyor general of Dakota as lot No. 86, and situated in Whitewood placer mining district, county of Lawrence, of Dakota Territory. *we* hereby apply to purchase said mineral claim or lot of land, and agree with the register to pay the receiver (10) ten dollars, being the legal price thereof.

HENRY SUESSENBACH.
HUGH McCAFFREY.
E. WELCH,
Per FRANK WELCH,
Administrator for Estate of E. Welch.
F. T. SUTHERLAND.

I, A. S. Stewart, register of the U. S. land office at Deadwood, Dakota, do hereby certify that the aforesaid mineral claim or lot of land, No. 86, is subject to entry by the above-named applicant-, the area being 3.47 acres and the legal price thereof ten dollars.

A. S. STEWART, *Register.*

95 "N." 55992, "N." 2. Form T. Application to purchase. Case of the placer mining claim lot No. 86, in Whitewood mining district, county of Lawrence, claimed by Henry Suessenbach, Hugh McCaffrey, *et al.* U. S. land office at Deadwood, Dakota. Filed the 16th day of July, A. D. 1878.

7—68

96 *Register's Final Certificate of Entry.*

Mineral entry No. 24, lot No. 86.

U. S. LAND OFFICE AT
DEADWOOD, DAKOTA, *July the 16th*, 1878.

It is hereby certified that in pursuance of the mining act of Congress approved July 26th, 1866, and the acts amendatory thereof, approved July 9, 1870, and May 10, 1872, Henry Suessenbach, Hugh McCaffrey, Edward Welch, by Frank Welch, administrator, and Frank T. Sutherland, whose post-office address is Deadwood, Dakota Territory, on this day purchased that mineral claim or lot of land designated as survey No. 86, situate, lying, and being in the Whitewood placer mining district, in the county of Lawrence and Territory of Dakota, known as the No. 15 above discovery, Whitewood Creek placer mining claim, embracing 3.47 acres of surface ground, as shown by said survey, for which the said Henry Suessenbach, Hugh McCaffrey, Edward Welch, by Frank Welch, administrator, and Frank T. Sutherland *and* have this day made payment to the receiver in full, amounting to the sum of ten dollars.

Now, therefore, be it known that upon the presentation of this certificate to the Commissioner of the General Land Office, together with the plat, survey, and description of said claim, a patent shall issue thereupon to the said Henry Suessenbach, Hugh McCaffrey, Edward Welch for his estate, and Frank J. Sutherland, if all be found regular.

A. S. STEWART, *Register.*

97 "N." 55992, "N." 3. Register's final certificate of entry. Case of the placer mining claim of Henry Suessenbach, Hugh McCaffrey, Edward Welch, by F. Welch, administrator, and Frank T. Sutherland upon the placer claim No. 15 above discovery, Whitewood creek, being lot No. 86; mining district, Whitewood placer; county, Lawrence; claimed by Henry Suessenbach *et al.* U. S. land office at Deadwood, Dakota, July the 16th, 1878.

98 Original.

Receiver's Receipt.

Duplicate to be given the purchaser.

Mineral entry No. 24, lot No. 86.

U. S. LAND OFFICE AT DEADWOOD, D. T., *July 16th*, 1878.

Received from Henry Suessenbach, Hugh McCaffrey, E. Welch, per Frank Welch, administrator, and Frank T. Sutherland the sum

of ten and no 100 dollars, the same being in full for the surface area embraced by survey No. 86, said mineral claim or lot of land being situate in Whitewood mining district, county of Lawrence and Territory of Dakota, and known as the placer claim No. 15 above discovery mining claim, embracing three & $\frac{47}{100}$ acres, as shown by said survey.

$10.00. J. T. McKENNA, *Receiver.*

Receiver's receipt. Case of the placer claim No. 15 above discovery mining claim, lot No. 86, in Whitewood mining district, Lawrence county, Dakota Territory, claimed by Henry Suessenbach *et al.*

99 TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

John A. Nye, Robery Chew, J. D. Russell, Lucius C. Liller, John Scollard, Wm. H. Fanton, R. H. Geary, W. R. Stebbins, C. R. Leroy, Julius Deetkin, J. W. Higbee, Wm. Munter, M. J. Wertheimer, Frank M. Farber, E. W. Hurlbut, and Myron C. Thum, being duly sworn, on oath deposes and says each for himself that he is a resident of the town of Deadwood, in the county of Lawrence, Territory of Dakota; that he resides on placer claim No. 15 above discovery on Whitewood creek, being known and designated by the field-notes and official plat on file in the United States land office at Deadwood as lot No. 86; that said placer claim No. 15 is within the exterior boundaries of the town of Deadwood, on which this deponent and many others have valid and existing rights as occupants and owners of town lots within the exterior boundaries of the town of Deadwood, and being on the surface of said placer mining claim No. 15 above discovery on Whitewood creek, and that there are now on said surface ground of said mining claim *bona fide* improvements—houses and buildings erected thereon—of the value of one hundred thousand dollars ($100,000.00).

Deponent further says that E. Welch, by Frank Welch, administrator; Frank T. Sutherland, Hugh McCaffrey, and Henry Suessenbach have made application for a patent to said mining claim, including the surface ground, notice of which application is now being published in the Black Hills Daily Pioneer, a copy of which notice is herewith inserted and made a part of this protest and affidavit.

Deponent further says that the surface of said mining claim is about to be patented as a part of the town of Deadwood
100 as a town site; wherefore deponent prays that a clause be inserted in the patent of said placer mining claim No. 15 above discovery on Whitewood creek, excepting and excluding from said patent all town property rights upon the surface of said mining

claim and all rights necessary or proper to the occupation, possession, and enjoyment of the same.

ROBERT CHEW.
J. D. RUSSELL.
LUCIUS C. MILLER.
JOHN A. NYE.
JOHN SCOLLARD.
WM. H. FANTON.
R. H. GEARY.
W. R. STEBBINS.
C. R. LEROY.
JULIUS DEETKIN.
J. W. HIGBEE.
WM. MUNTER.
M. J. WERTHEIMER.
FRANK M. FARBOR.
E. W. HURLBUT.
MYRON C. THUM.

Subscribed and sworn to before me this 7th day of June, A. D. 1878.

JOHN R. FRASER,
[SEAL.] *Probate Judge.*

"N." 55992, No. 39. Protest of John A. Nye *et al.* ag'st patent to surface ground of lot No. 86. Lot No. 86. U. S. land office at Deadwood, Dakota. Filed the 13th day of July, A. D. 1878, at 3 o'clock p. m. A. S. Stewart, register.

101 *Notice No.* 31.

Application for a patent.

U. S. LAND OFFICE, DEADWOOD, DAKOTA,
May the 15th, 1878.

Notice is hereby given that E. Welch, deceased, by Frank Welch, administrator, Frank T. Sutherland, Hugh McCaffrey, and Henry Suessenbach, whose post-office address is Deadwood, Lawrence county, Dakota Territory, have this day filed their application for a patent for No. 15 above discovery, on Whitewood creek placer ground, bearing gold, with surface ground, situate, lying, and being in Whitewood placer mining district, county of Lawrence and Territory of Dakota, and known and designated by the field-notes and official plat on file in this office as lot number 86, the exterior boundaries of said lot No. 86 being as follows, to wit:

Variation 15° east. Commencing at a sandstone 4 x 8 x 16 inches, marked No. 1 on one side and M. C. 86 on the opposite side, for corner No. 1, and running thence north 31° east 110 feet to corner No. 2, the same being corner No. 1, lot No. 76, and from which corner locating monument No. 1 bears south 3° 48′ west 1,984 feet

distant; thence south 59° 15′ east 723 feet to corner No. 3, the same being corner No. 4, lot No. 76; thence south 14° 15′ west 230 feet to corner No. 4; thence north 66° 49′ west 487 feet to corner No. 5; thence north 25° 15′ east 68 feet to corner No. 6; thence north 46° west 409 feet to place of beginning, containing 3.47 (three $\frac{47}{100}$) acres.

This claim is bounded by placer lot No. 76 below and lot No. 72 and placer claim No. 16 above discovery.

The location of this mine is duly recorded in the recorder's
102 office of Whitewood placer mining district in Book A, pages 36, 69, 99, 151, 216, 257, and in the register of deeds' office in Book B, page 324, and Book F, page 152.

Any and all persons claiming adversely any portion of said placer mine or said mining ground as hereinbefore described are required to file their adverse claim with the register of the United States land office at Deadwood, in the Territory of Dakota, during the sixty days' period of publication hereof, or they will be barred by virtue of the provisions of the statute.

I direct that this notice be published for sixty days in the Black Hills Daily Pioneer.

A. S. STEWART, *Register.*

ROHLEDER AND SMITH,
U. S. Dep. Min. Surveyors.

28 D 6 o t Exeer.

103 To the introduction of which as evidence plaintiffs at the time objected and objected to any evidence being given on the part of the defendant under the pleadings in this action, except such as may tend to affect the amount of the damages which the plaintiffs may be entitled to recover, because neither of the alleged equitable defenses or counter-claims pleaded in the answer constitutes any defense to this action.

And plaintiffs specifically object to the document offered, as the patent offered and received in evidence is conclusive evidence of the title and may not be explained, controverted, enlarged, or contradicted in any way.

And plaintiffs make the further objection on the ground that it is not competent, relevant, or material to any of the issues in this action, and that it cannot be received legally, as the patent is conclusive of the title coming from the United States to the patentees named in it.

Plaintiffs object to it for the further reason that it appears by the transcript of the General Land Office offered in evidence that W. R. Stebbins, the alleged grantor of the defendant and under whom it claims title to the premises in controversy, did on the 13th day of July, 1878, along with fifteen others claiming to be residents on placer mining claim No. 15 above discovery, on Whitewood creek, which was known and designated by the field-notes and official plat on file in the United States land office at Deadwood as mineral lot No. 86, file their sworn protest in said land office against

the issuance of a United States patent to the applicants mentioned in said protest and who are the same as named in said patent, on the ground that said W. R. Stebbins and the other protestants
104 were occupants and claimants of lots on the surface of said placer mining claim No. 15, and had made *bona fide* improvements thereon of the value of $100.00, and did not within the period of publication file his adverse claim to the lot in controversy as a part of the claim applied for by the patentees, and did not within thirty days thereafter commence an action in any court of competent jurisdiction to determine his right to the possession of the premises in controversy, and therefore waived his adverse claim to the same; and for the farther reason that all question regarding the adverse claim of said W. R. Stebbins to the lot in controversy was determined by the allowance of the application and entry at the United States land office at Deadwood of said mineral lot No. 86 by the applicants, and the issuance of a United States patent to them therefore.

Which objections were overruled by the court *pro forma*, with a general reservation as to its ruling, and the document was received in evidence, is marked Exhibit G, and is in the words and figures following, to wit.

To which ruling plaintiffs at the time duly excepted.

The document was offered by the defendant for the purpose of reading all of the proceedings and papers which were the basis and foundation for the issuance of the patent to mineral lot No. 86.

105 LOUIS F. HILDEBRAND, sworn on the part of defendants, testified as follows:

I reside at present in the valley—False Bottom. I first came to Deadwood in the beginning, on April, 1876.

Witness was asked: "How long did you remain at that time?"

To which question plaintiffs objected as incompetent and immaterial for the reason that all persons were excluded from here by provisions of the United States treaty with the Sioux Indians; which objection was overruled by the court, and to this ruling plaintiffs at the time excepted.

Witness continued: "I resided in Elizabethtown during all the time until 1880. Since 1880 I have lived on False Bottom, in Lawrence county. I am recorder of Whitewood placer mining district. My occupation has been mining; it is farming now. I was elected recorder of Whitewood placer mining district Mary 18th, 1878. Prior to that time J. J. Sutherland was recorder." His deputy was F. T. Sutherland—the man called Frank Sutherland. This J. J. Sutherland and F. T. Sutherland are the parties who were interested and owners in placer claim No. 15 below discovery. I have the rules, regulations, by-laws, and records of that placer mining district with me. I was a resident of Elizabethtown from February, 1877, until the following fall. My occupation during that time was placer mining. I know what the rules and regulations of the miners of that district were during that year. These were the rules found on page

three of one of the volumes, Book A. Book A is one of the records of the placer mining district. The rules and regulations may be found commencing on page three and extending to the next page.

These rules were in force in March, April, May, and June,
106 1877, and were always acted on by the miners of that district. There were miners' meetings held in 1877. They are all dated in there (referring to book.)

Defendant offers in evidence the rules and regulations above referred to for the purpose of offering the location of this mining property by the locators—that is, the location noticed and certificates there on record.

Plaintiff objects to these rules upon the ground that they are incompetent, irrelevant, and immaterial, not tending to sustain any issue in the case; that the plaintiffs claim that the location was well made under the laws of the United States and not under the rules and regulations of the miners, and object to these rules as being inadmissable for the reason that they were adopted on the 6th day of April, 1876, or purport in the record offered so to have been adopted by the miners of the Whitewood district, which at that time was within the limits of the Sioux Indian reservation, on which no white person might legally go, and in which at the time no rights could be acquired nor could any legal rule be adopted.

Which objection was overruled *pro forma* by the court, and to this ruling the plaintiffs at the time duly excepted.

The rules were as follows:

107 *Copy of Laws Drawn up and Adopted by the Miners of Whitewood District in Meeting on Discovery Claim April 6th*, 1876.

SECTION I. This district shall be known as Whitewood district and shall extend from the head-waters of Whitewood creek to the discovery claim and below discovery claim to the lower line of claim No. 17 on said creek.

SECTION II. All claims shall consist of 300 feet, running up and down the general course of said creek and include first and second rim-rock, and discovery party shall be entitled to one additional claim for such discovery.

SECTION III. All claims shall be located and recorded in person and all claims shall be recorded within five days from the date of location.

SECTION IV. All claim-owners shall have the right of drainage, but such right shall work no injury to adjoining claims and no tailings shall be deposited on adjoining claims without the consent of the party interested.

SECTION V. Claims held and recorded in copartnership may be represented by the requisite amount of labor on any one claim so held, provided said claims adjoin each other.

SECTION VI. There shall be elected a recorder for this district who shall hold his office for the period of one year unless removed for incompetency or neglect of duty, and such recorder shall
108 receive as fees one dollar and fifty cents for each claim so

recorded by him, and the further sum of one dollar and fifty cents for all transfers or bills of sale &c. &c.

SECTION VII. All miners' meetings shall be called by the recorder, said meetings to be called by posting at least three notices in the most conspicuous places in the district, and all meetings shall be held at the office of the recorder, except in cases of disputes about claims, in which cases the meetings shall be held on the ground in dispute, and all petitions for the purpose of a miners' meeting shall be signed by at least ten claim-owners of that district, and that said notices shall be posted at least five days before the day appointed for said meeting.

SECTION VIII. All claims in this district shall be represented on April 20th, 1876, by one day's labor on such claims, and all claims shall be represented by performing one day's labor in each week thereafter.

109 Defendant offers in evidence from the same Book A already identified by the witness as the records of Whitewood placer mining district the relocation and record of the placer claim No. 16, in Whitewood mining district, which includes the property in controversy, as has been shown, found on page 216 of said record. Said relocation and record by Noah Siever, Edward Durham, Thomas Clifton, and William Moore is as follows:

"DEADWOOD CITY, *March 16th*, 1877.

NOTICE.—We hereby relocate and record claim number 15 above discovery, in Whitewood mining district, according — the local mining laws of this district Recorded March 16th, 1877.

J. J. SUTHERLAND, *Recorder.*
F. T. SUTHERLAND, *Deputy.*"

On the margin of record: "Noah Siever, Ed. Durham, Thomas Clifton, William Moore."

To which the plaintiffs object for the reason that the same is incompetent, immaterial, and irrelevant, not tending to sustain any issue in this case; for the further reason that the equitable defense and counter-claim pleaded constitute no defense to the action, and that the answer itself shows that if the defendant or its grantors had any interest in this mining claim at the time of the application of Suessenbach and others for a patent it was an interest adverse to the applicants for patent, which it is not alleged was insisted upon and asserted in the manner prescribed by law, by the filing of an adverse — upon it and the commencement of a suit thereon, and for that reason the *da*verse claim was waived; and, to save time, the plaintiffs make this objection to any proof from the records of this district of the various conveyances and to the notice of
110 the conveyances alleged in the answer of the defendant; which objection was overruled by the court *pro forma*, and to this ruling plaintiffs at the time excepted.

Defendant offers in evidence the said Record Book "A" for the purpose of showing that it was the custom of the placer miners and

mining claimants in Whitewood placer mining district to record their certificates of location and notices, the witness having stated that said Book A was one of the records of the said Whitewood placer mining district for the year 1877 and following.

Plaintiffs object upon the ground that it is incompetent, immaterial, and irrelevant for the reasons stated in the last objection; which objection was overruled by the court *pro forma*, and to this ruling plaintiffs excepted.

The witness continued: "It was customary for the placer mining owners to record their mining location notices during the year 1877 at the recorder's office. The first recorder was J. J. Sutherland, and I was his successor and have been since. Frank Sutherland was his deputy. I know his signature." Witness was here asked, "Do you recognize his signature on that book?"

Which question was objected to by plaintiffs as incompetent and immaterial: First, there is nothing in the rules or customs showing that a deputy was authorized; second, there is nothing in the rules or customs that show that the keeping of a record was authorized; third, because there is nothing in the rules or customs shown that authorizes the deputy to sign his own name to the records; which objections were overruled by the court *pro forma*, and to this ruling plaintiff at the time excepted.

111 Witness continued: "The entry on page 216 of the relocation of this claim No. 15 above discovery March 16th, 1877, is in Frank Sutherland's handwriting. Book A is known as the index. The record book is known as Book B."

Defendant offers in evidence Book B for the purpose of showing that it was the custom among the miners of the placer mining district to make the records.

Objected to as incompetent, immaterial, and irrelevant for the same reasons as to the last offer; which objection was overruled *pro forma* by the court, and to this ruling plaintiffs at the time excepted.

The witness continued: "The conveyance from J. J. Sutherland to F. T. Sutherland, mortgage or bill of sale or whatever it may be termed, was recorded while Sutherland was recorder and is recorded in Book B, page 17, of the records of the Whitewood placer mining district.

Witness was here asked: "Just give the date there so that the stenographer may get it."

Which question was objected to on the ground that the document itself is the best evidence; which objection was overruled by the court, and to this ruling plaintiffs at the time duly excepted.

Witness continued: "July 25th, 1877, Deadwood City. The record on page 257 of Book A is in J. J. Sutherland's handwriting. He was recorder at the date that the entry purports to have been recorded. This record book and all these record books came from him to me. He delivered them to me as his successor in office. The date of that is Deadwood, April 13, 1877, recorded June 26th, 1877."

The defendant offers in evidence each of the records here referred

to, but with the offer to connect them by proof of the fact of their execution.

112 The record is as follows:

"DEADWOOD, *April 13th*, 1877.

Know all men by these presents that we, the undersigned, have this day, for and in consideration of the sum of sixteen hundred dollars—$1,600.00—sold and quitclaimed to F. T. Sutherland, J. J. Sutherland, and H. F. Lake all our right, title, and interest in and to a certain piece or parcel of mining ground situated at the junction of Whitewood and Deadwood creeks and known in Whitewood district as claim No. 15 above discovery, in said district, and in Lost district as claim No. 26 below discovery, comprising 300 feet in length on Whitewood creek and extending back to the hill according to the local laws of Lost and Whitewood mining districts, and we hereby put said parties in possession of the same.

Witness our hands and seals this day and year first above written.

WM. MOORE. [SEAL.]
THOMAS CLIFTON. [SEAL.]
NOAH SIEVER. [SEAL.]
ED. DURHAM. [SEAL.]

Attest: KELLER KURTZ.
W. R. STEBBINS.

Recorded June 26th, 1877.

J. J. SUTHERLAND, *Recorder*.
F. T. SUTHERLAND, *Deputy*."

113 DEADWOOD CITY, *July 25th*, 1877.

Know all men by these presents that I, J. J. Sutherland, do hereby sell, release, and quitclaim to F. T. Sutherland all my right, title, and interest in and to a certain piece of mining ground located and situated on Whitewood creek and known as claim No. 15 above discovery, on said creek, for and in consideration of the sum of one thousand dollars, $1,000.00, to me in hand paid for said interest, consisting of an undivided one-third of said claim. This indenture is made to secure the said F. T. Sutherland for the sum of one thousand dollars, $1,000.00, at the rate of 2½ — per month, and if at the end of sixty days the above-mentioned amount is paid, with the interest, then this deed shall be null and void; otherwise in full force and effect.

In witness whereof I have hereunto affixed my hand and seal this 25th day of July, A. D. 1877.

JAS. J. SUTHERLAND.

Recorder Aug. 3d, 1877.

J. J. SUTHERLAND, *Recorder*,
By F. T. SUTHERLAND, *Deputy*.

Put on record Feb'y 2d, '78.

To which plaintiffs object on the ground that the testimony is incompetent, immaterial, and irrelevant, tending to sustain no issue made by the pleadings in the case, being anterior to the issuance of the patent which concludes all questions of title as between claimants of any portion of the premises as mining ground.

Which objection was overruled *pro forma* by the court, and to this ruling plaintiffs at the time duly excepted.

114 NOAH SEIVER, sworn on the part of the defendant, testified as follows:

"I reside in Galena now. I lived in Deadwood from the spring of 1876 until within the last two years. During the last two years I have been in Deadwood probably once a month, sometimes twice a month. I have been engaged in placer mining in Deadwood, Whitewood, and Bear Butte districts off and on since 1876. I am acquainted with placer claim No. 15 above discovery, on Whitewood, known as mineral lot 86, and have known it since the spring of 1876."

Witness was here asked, "Who were the locators of placer claim No. 15?"

Which question was objected to as incompetent, irrelevant, and immaterial; that all questions as to the title or location or necessary acts to perfect the title are determined by the patent of the United States; which objection was overruled by the court *pro forma*, and to this ruling plaintiffs excepted.

Witness replied: "A man by the name of Wilkinson, I believe. He was the original locator. I had some connection with the claim."

Witness was here asked, "Well, what?"

Plaintiffs objected to all testimony of Mr. Seiver in reference to the location or ownership of this placer claim prior to the 16th day of July, 1878, the date of the entry of the claim for patent in the United States land office at Deadwood, Dakota, by Henry Suessenbach and others, the applicants for patent, on the ground that it is irrelevant, immaterial, and incompetent; that all questions as to the title and ownership of the property are determined by the issuance of the patent to the applicants therefor; which objection was overruled *pro forma* by the court, and to this ruling plaintiffs at the time duly excepted.

115 Witness was here asked, "Now, I will call your attention to the proceedings subsequent to the 28th day of February, 1877, commencing on the 28th day of February, 1877."

Plaintiffs object to any testimony or any act done by this witness or his co-owners after the 13th day of April, 1877, for the reason that the defendants have already offered in evidence a record of a conveyance by Mr. Sevier and those claiming to be his co-owners of all their interest in that claim of date April 13th, 1877, to J. J. Sutherland and F. T. Sutherland and H. F. Lake, and that any acts or declarations by those grantors after that date are incompetent; which objection was overruled by the court *pro forma*, and to this ruling plaintiffs at the time duly excepted.

Witness continued: "I was part owner in the claim; Clifton, Durham, and Moore were the other owners; William Moore, Thomas Clifton, and Edward Durham. During the month of March, 1877, I think it was, we made a relocation of that claim after the 28th day of February, 1877. We caused the notice of relocation to be recorded."

Witness was here asked, "Where?"

To which question the plaintiff objected. The objection was overruled by the court, and to this ruling plaintiffs excepted.

Witness answered, "In Whitewood mining district."

Witness was asked, "I call your attention to Book A, page 216, and what purports to be a notice of a relocation and record of claim No. 15, and ask if that is the record which you caused to be made."

Which question was objected to by plaintiffs as incompetent. This objection was overruled by the court, and to the ruling the plaintiffs excepted.

The witness continued: "A. Yes, sir; that is the record. I went to the recorder's office. I am not certain whether I
116 dictated the notice to him or whether he dictated it himself. At that time I was acquainted with the boundaries of the claim. I became acquainted with it in March, 1876. About that time I first had some connection with the claim as claimant."

All acts or testimony prior to the 26th day of February, 1877, are objected to by plaintiffs as being incompetent, irrelevant, and immaterial, upon the ground that the *locus* was at that time Indian territory and that no right at any time could be acquired by any citizen upon the same; which objection was overruled by the court, and to this ruling plaintiffs excepted.

Witness continued: "On the 16th of March, 1877, there had been a discovery of gold in this placer claim."

The witness was here asked, "In what quantity" was gold discovered?

To which question plaintiffs objected as immaterial; which objection was overruled *pro forma* by the court, and to this ruling plaintiffs excepted.

Witness answered, "Very small."

Witness continued: "During the month of March, 1877, as a locator, I suppose, I worked all the time. I was in possession and working it on the 28th day of February, 1877, with my co-locators. To the best of my recollection, we worked all the time during the month of March and April."

Witness was here asked, "What was the value of the work done upon that claim by the locators during that year?"

Plaintiffs object to any testimony from this witness as to any acts of location, ownership, or control of this property or its relocation by him prior to the 16th day of July, 1878, the date of the entry of the claim in the land office at Deadwood by the applicants for patent, upon the ground that it is incompetent, irrelevant, and
117 immaterial, the defendants by their answer not claiming to connect themselves with the title that descended and came

to the patentees from the Government of the United States; which objection was overruled by the court, and to this ruling plaintiffs excepted at the time.

Witness was here asked, "Confine yourself, please, to a time subsequent to the 28th day of February, 1877."

Plaintiffs object to the witness giving any testimony subsequent to the 13th day of April, 1877, the time when, by the showing already made by the defendant, the witness and his co-claimants in the claim parted with all their interest to F. T. Sutherland, J. J. Sutherland, and H. F. Lake; which objection was overruled *pro forma* by the court, and to this ruling the plaintiffs at the time excepted.

Witness answered, "I could not state exactly; approximating, it was five or six hundred dollars' worth of work. On the 16th day of March and subsequently, while I had connection with the claim, it was staked with four stakes. Two were at the lower line, between 14 and 15; two at the upper, between 16 and 15. As near as I can remember, they were stakes somewhere in the neighborhood of four feet high, hewed pine and saplings. They were three or four inches in size, hewed on four sides and square. There was one stake on the opposite hill right below where Farley's fire-proof is or where his fire-proof used to be, and the other stake was over against the hill, what we claimed second rim. The other stake was back of the First National bank, on the hill. The other stake was right out beyond Lee street. We calculated to put those stakes as near the corner of the claim as we knew. The property in controversy was situated within the boundaries defined by those stakes. We had a discovery stake about the center of the claim. It was back of where
118 the old theatre used to be—Langrish theatre, across the sreek; beyond, across the creek, very near the centre of the claim. It was there during the month of March, 1877. There was a location notice on the stake of placer claim 15, with the names of the locators on it, Noah Siever, Ed. Durham, Thomas Clifton, and William Moore. I think the boundary stakes and the discovery notice were maintained until we sold out. We prospected and mined on the claim, such as digging out and sluicing, regular placer mining. We sunk a shaft on the north side of our claim, near the old Pioneer printing office. That was situated on our lower line and beyond back of where the Deadwood bank or where the Grand Central hotel is now situated. Our sluicing was from the point of rock on the east side clean across or very near across the whole claim; then running across the creek clean under the theatre. We got some gold. The signature- to the paper which you hand me purporting to be dated on the 28th day of March, 1877, being or purporting to be an instrument between Noah Seiver, Edward Durham, Wm. Moore, and Thos. Clifton, of Deadwood, Lawrence county, Territory of Dakota, of the one part, and William R. Stebbins and C. Hoffman, of the same place, of the other part, are in the handwriting of Noah Seiver, Edward Durham, William Moore, and Thomas Clifton. Each of those parties signed it. They are the parties I have referred to as the locators of placer claim No. 15. The paper was delivered to Stebbins and Hoffman on the 28th of March, 1877. The premises

described in that instrument are the same occupied by the First National bank and in this controversy. The instrument is in Judge Brierly's handwriting. E. C. Brierly appears as a witness to it. Brierly is dead, I understand.

119 The defendant offers in evidence the deed here referred to. The plaintiffs object to it as incompetent, immaterial, and irrelevant for the reason that it has already been shown by this witness that the land was public mineral land of the United States, to which title was in the Government; that it has been shown in this case that the title of the Government has come to Henry Suessenbach and others, patentees, by virtue of the patent issued and in evidence, and this deed only conveyed such right as the parties had at the time, which was a mere right of occupancy, subject to the right of the Government to dispose of the paramount title, and cannot limit or affect the permanent title of the Government thereafter coming to the patentees, and for the further reason that if the grantor of defendant was in possession, as alleged by their answer, at the time of this application for patent, claiming under a grant of this land from the mining locators and claiming it as mineral land, his interest was an interest adverse to that of applicants for patent, which was waived by his failure to file in the land office a proper protest against said application for patent, and thereafter within the time limited by law failed to commence his suit to determine his adverse right to the premises in controversy, and therefore waived the same.

Which objection was overruled *pro forma* by the court, and to this ruling plaintiffs at the time excepted.

EXHIBIT "H."

The deed is marked Exhibit "H" and is as follows:

"Noah Siever, Edward Durham, William Moore and Thomas Clifton, of Deadwood, Lawrence county, Territory of Dakota, agree with William R. Stebbins and C. Hoffman of the same place, that in consideration of one dollar to them in hand paid, the re-

120 ceipt whereof is hereby acknowledged, the said Stebbins and Hoffman have full power to occupy and possess lot No. 2 A on Main street in the town of Deadwood, county and Territory aforesaid. The said Noah Seiver, Edward Durham, William Moore and Thomas Clifton being the owners of placer claim number fifteen—15—above discovery in Whitewood mining district, county and Territory aforesaid, hereby deeding and conveying to said Stebbins and Hoffman all their claim, right to possess or title they may have by reason and virtue of said placer claim to said premises,—excepting the right to mine for gold under said premises—and then such mining to be done after reasonable notice given to said Stebbins and Hoffman, and all reasonable precaution in carrying on said mining to be used to prevent damage and injury to said premises.

In witness whereof, we hereunto set our hands and seals.

Done at Deadwood, Lawrence county, Territory of Dakota, this 28th day of March, A. D. 1877.

NOAH SIEVER, [L. S.]
EDWARD DURHAM, [L. S.]
WILLIAM MOORE, [L. S.]
THOMAS CLIFTON. [L. S.]

In presence of—
E. C. BREARLEY.

Quitclaim. Noah Siever, Edward Durham, Wm. Moore, and Thomas Clifton to Wm. R. Stebbins and C. Hoffman. Territory of Dakota, county of Lawrence, *ss:* Filed for record this the 25th day of April, A. D. 1877, at 7.30 p. m., and recorded in vol. No. A of Quitclaims, on page 77. James A. Hand, register of deeds, by C. E. Hunrahan, deputy. Exhibit H.

121 Witness continued: "The signature- to the instruments which you hand me, bearing date the 27th day of March, 1877, purporting to be signed by Noah Siever, Edward Durham, James A. Hamilton, and H. J. Scott, of Deadwood, Lawrence county, recited to be the parties of the first part, and William R. Stebbins and C. Hoffman, of the same place, parties of the second part, are in the handwriting of Noah Siever, Edward Durham, James A. Hamilton, and H. J. Scott. They signed that instrument. The signature, as a witness, of E. C. Brierly is Brierly's signature. The deed was delivered the 27th day of March, 1877. The register of deeds' office in Deadwood was opened some time in April, 1877. The first recorder was James A. Hand. Brierly is dead, I understand."

Defendant offers in evidence the deed above referred to.

The plaintiffs interpose the same objection to the reception of this instrument in evidence as was noted to the reception of Exhibit "H." The objection was overruled *pro forma* by the court, and to this ruling plaintiffs at the time excepted.

It was admitted by the plaintiffs, without waiving the objection to the testimony, that the handwriting endorsed upon the back of this deed, which is here introduced purporting to be a certificate of the record of said instrument, is that of James A. Hand, who was at the time register of deeds of said county.

The deed is marked Exhibit "I" and is as follows:

122 This indenture made the twenty-seventh day of March, A. D. 1887, between Noah Siever, Edward Durham, James A. Hamilton and H. J. Scott, of Deadwood, Lawrence county, Territory of Dakota, parties of the first part, and William R. Stebbins and C. Hoffman, of the same place, parties of the second part, witnesseth:

The said parties of the first part for and in consideration of the sum of three thousand dollars to them in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, have remised, released and forever quitclaimed and by these presents do remise, release and forever quitclaim unto the said parties of the second part, and to their heirs and assigns—all of the following-

described real estate or landed claim or possessory right or property situate and being in Deadwood, Lawrence county, Territory of Dakota, to wit: Lot number two (2) A as located by the parties of the first part March 15th, A. D. 1877 and recorded in Book B, page twenty-three of the records of said Deadwood. The lot number two (2) A is more particularly described as being on Main street in said Deadwood, having a frontage of twenty (20) feet on said Main street and running back to the depth of one hundred feet. There is now upon said lot one two-story building (nearly completed) with a frontage of twenty feet and depth of fifty feet. Together with all the rights, privileges and franchises thereto incident appendant or appurtenant or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof, and also all the estate right, title, interest, property possession claim and demand whatsoever as well in law as in equity of the said parties of the first part of in or to the said premises and every part and parcel thereof with the appurte-
123 nances. To have and to hold all and singular the said premises and privileges thereto incident unto the said parties of the second part, their heirs and assigns forever.

And the said Noah Siever, Edward Durham, James A. Hamilton and H. J Scott, for themselves and their assigns and representatives do hereby covenant and agree that they have full right and power to deed and convey the said premises, and that this conveyance does convey to said William R. Stebbins and C. Hoffman, parties of the second part, their heirs and assigns the full possession, right of possession and property in and to said lot number two—2—A as against any individual, individuals, corporation or corporations whomsoever or whatsoever notwithstanding, forever.

And the parties of the first part do further agree that they will maintain and defend and that they do hereby warrant and agree to sustain and defend the title and possession of the said parties of the second part to the said premises as against any individual individuals corporation or corporations. The said parties of the first part further agree that if any suit or suits be commenced against the said parties of the second part, involving the title to or the right of possession of the property herein conveyed, the said suit or suits will be defended and contested at the sole expense and cost of the parties of the first part, who hereby solemnly agree to keep said parties of the second part free and clear of any costs or damages that may occur by reason of any litigation in the premises.

In witness whereof the said parties of the first part have hereunto set their hand- and seals the day and year first above
124 written.

NOAH SIEVER. [L. S.]
EDWARD DURHAM. [L. S.]
JAMES A. HAMILTON. [L. S.]
H. J. SCOTT. [L. S.]

Signed, sealed, and delivered in the presence of—
E. C. BRIERLY.
JOHN WOLZMUTH.
CHRISTIAN FLUCKEN.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

On this 20th day of April, A. D. 1877, before me, a notary public in and for said county and Territory, personally came the above-named Noah Siever, Edward Durham, James A. Hamilton, and H. J. Scott, who are personally known to me to be the identical persons whose names are affixed to the above deed as grantors, and they acknowledged the same to be their free act and deed.

Witness my hand and seal this the date aforesaid.

JAMES A. HAND,
Notary Public. [SEAL.]

Quitclaim deed. N. Seiver, Durham, *et al.* to Stebbins & Hoffman. I hereby certify that the within deed was filed for record this 20th day of April, 1877, at 6.30 p. m., and duly recorded in Book A of Deeds, on page 24 & 25, of Lawrence county records. James A. Hand, register of deeds.

125 The witness continued: "In regard to the signing of the deed by Hamilton and Scott, they furnished us material to build with; we took them in as partners. At the time we sold to Stebbins and Hoffman we had a building up on that lot—a board building two stories high—roof on and floor in."

The witness was here asked: "What consideration was paid by Stebbins and Hoffman for these conveyances?"

Which question was objected to by plaintiffs as immaterial and incompetent and not an issue in this case; which objection was overruled by the court *pro forma*, and to this ruling plaintiffs at the time excepted.

The witness answered: "Three thousand dollars."

Witness was asked: "You may state whether there was any arrangement with reference to the ownership of this lot by you and Ed. Durham with your colocators and owners in that claim. In other words, you may state whether or not there had been any segregation and this set off to you."

To which question plaintiffs objected as immaterial and incompetent; which objection was overruled by the court, and to this ruling the plaintiffs at the time excepted

Witness continued: "We came into possession by segregation, and thereafter Moore and Clifton made no claim to it. Myself, Durham, Moore, and Clifton sold out this placer claim to J. J. Sutherland, Frank Sutherland, and H. F. Lake, I think is his name. Myself and Frank Sutherland made the sale in Post & Stebbins' bank."

Witness was here asked: "State what took place there with reference to this sale, and what was said and done."

Which question was objected to by plaintiffs as incompetent, irrelevant, and immaterial. It has been shown that the instrument was in writing, and under the law it is conclusively
126 presumed to contain all the agreements and stipulations of the parties.

The evidence was admitted and the ruling of the court reserved, to which the plaintiffs at the time excepted.

Witness continued: "Mr. Sutherland came in there, in the bank—I was watchman in the bank at the time—and asked me if I wanted to sell claim 15. I told him I did. He asked me what I asked for it. I told him our price for the claim was two thousand dollars. He told me he would not pay that, but he offered me eighteen hundred dollars for the claim. I then told him that there were two lots on the claim that we had given bed-rock title, or about the same as bed-rock title—as strong as we could make the title—and we felt bound to protect those, and if he agreed to protect those lots the same as we had agreed to I would make the sale, and he agreed to do it, and upon those terms the sale was made. They were the Hoffman lot and the lot A where the bank is. It was not numbered then. It was the lot in controversy."

The witness was here asked: "What was done in pursuance of that agreement?"

Plaintiffs move to strike out all the testimony of this witness in reference to the conversation between himself and Frank T. Sutherland to which he has testified upon the ground that the same is incompetent, immaterial, and irrelevant, for the reason that it is an effort, as shown by the testimony of the witness, to engraft an exception upon a grant of property which is already shown in evidence to have been in writing and is in opposition to the statutes of this Territory that regulate this matter; that where an agreement of parties is in writing it supercedes all the oral negotiations or stipulations concerning its matter which precede or accompany its execution, and also upon the ground that, being
127 an agreement with reference to land, it is invalid by reason of the statute of frauds of the Territory.

The ruling of the court was reserved and the plaintiffs at the time excepted.

Witness was permitted to continue: "I have resided here all the time until about two years ago, and I have frequently been here since."

Witness was asked: "Since you made this conveyance to Hoffman and Stebbins who has been in possession of that lot?"

Which question was objected to by plaintiffs, and the objection was overruled by the court *pro forma*, and to this ruling plaintiffs at the time excepted.

Witness continued: "Starting from that time Stebbins and Post were first in possession of that place. I think Wood was associated with them afterwards. They were succeeded by the First National bank. We gave them possession of the building. Stebbins & Post, I think, finished it—the bank—whoever they were. At the time I had this conversation with Sutherland, Stebbins & Post were in possession—W. R. Stebbins, the grantee in my deed. He was one of the firm of Stebbins, Wood & Post."

On cross-examination the witness testified:

"The discovery that I spoke of on that claim 15 was made

early in the spring of 1876, before I came over here, before I came over from Custer City, early in the spring of 1876. The boundary stakes I have spoken of were erected after the ratification of the treaty. I think the notice was put up about the same time. The notice was put up since the relocation. The discovery stake was across the creek, back of the Langrishe theatre, toward where Farley's fire-proof is. There was a well in there on Sherman street, and it was close to the well. The discovery was near the hill
128 back of Sherman street. It was west of Sherman street, but on the east side of the creek. The instrument signed by Clifton, Durham, Moore, and myself was made before the one signed by myself, Durham, Hamilton, and Scott. It was after we had agreed to sell that the agreement of segregation between myself and Durham on one part and Clifton and Moore on the other was made. I don't remember how soon it was after the first instrument was made that the agreement of segregation was made between us. I have no recollection of it. I am not prepared to say whether the first instrument was made after we commenced the erection of the building. I don't know. At the time Durham, Moore, Clifton, and myself claimed all this placer claim fifteen. James A. Hamilton and H. J. Scott did not claim any interest in the ground. It was after the segregation between Moore and Clifton on the one part and Durham and myself on the other that Scott and Hamilton became interested. The instrument marked Exhibit H and dated the 28th day of March, 1877, was delivered on the day it bears date, to the best of my recollection. I think it was delivered the same day. I am not positive whether it was delivered before the segregation and the execution of the second instrument. I think the dates will show. In the segregation we took Hamilton and Scott in as partners. Before the segregation the ground was claimed by Durham, Clifton, Moore, and myself; after the segregation Durham and I took Hamilton and Scott in on the lot. As near as I can recollect, that instrument was delivered on the day it bears date. I don't know that I can explain why it is that the deed from Durham, Moore, Clifton, and myself, which was delivered on the day of its date and which bears date the 28th day of March, was delivered on that day, and the deed from Durham, myself, Hamilton, and
129 Scott, the latter two — who had no interest in the claim until after its segregation, and which bears date the 27th day of March, 1877, was delivered on that day. I know both deeds were given near about the same time. It has been a good many years since they were given. The only recollection that I have about it is that Hamilton and Scott furnished the money or furnished the lumber to build the bank building, and under those considerations they were taken in on this lot. We were all in Brierly's office when we signed the instrument marked Exhibit H, at the time he wrote it out. I suppose that was at the time of its date. I do not know positively. I know it was signed there at the time when he finished writing. We were all in his office and it was signed right in his office. The instrument went out of our hands the day it bears date. I remember it was executed and delivered on the 28th of March,

1877, only from the date of the instrument. The instrument marked Exhibit "I" passed out of our hands the same day we subscribed it. I don't know when it was acknowledged. I am not prepared to say whether we acknowledged it before Mr. Hand, the register of deeds, at the same time or afterwards. It was done after the deed was delivered by us. I could not say how long afterwards. I don't remember. I know it was done after it had passed out of our hands. I don't remember exactly how it was, but Brierly delivered the deeds—Judge Brierly. After signing them we left them in Brierly's office. The deed was acknowledged in Mr. Hand's office, I think. His office at that time was on Sherman street, in a little building, I think. I am not positive whether in April, 1877, I acknowledged it in Mr. Hand's office on Sherman street, but I know Hand had his office there. I don't say he had his office
130 there at that time. I am not positive as to that. I am not prepared to say where I acknowledged it; I could not say. The only recollection I have of these instruments or the date of their delivery to Mr. Stebbins or to Mr. Brierly as the agent of Mr. Stebbins I get from the mere date of the instruments themselves. I am sure the dealing in reference to the purchase of this interest in the claim by J. J. Sutherland, Frank T. Sutherland, and H. F. Lake on the one part and my co-owners and myself on the other was made with Frank Sutherland. I am not positive whether the money was paid through the bank or whether Frank paid it. The money was paid; I don't remember by whom. The sale to J. J. Sutherland, F. T. Sutherland, and H. F. Lake was made after we sold to the bank. The segregation between Durham and myself and Clifton and Moore was only on the lot. There was no segregation of the claim as such. After the segregation Moore and Clifton claimed no interest in the bank lot. Durham and myself claimed no interest in the lot that had gone to Moore and Clifton. I think the lot that went to Moore and Clifton was a lot down near Gold street. It was on the claim Durham owned. To explain the matter, I would say that when we laid off the town there the claim owners were allowed so many lots. We laid the lots off in fifty feet first and each one drew for their lots so many lots and the balance of the lots on the claim were divided into twenty-five feet by a hundred deep, and of course we drew for the lots. I think there were three lots allotted to each one of the claim owners; the balance was drawn from by outsiders. That was the segregation. That was the only segregation of that property, only drawing lots back and forth among ourselves. That segregation was made the day the town was laid out—somewheres in April, 1876; it might have been in May. In 1877, after the ratification of the treaty, Durham,
131 Moore, Clifton, and myself relocated the claim. I think Durham and I traded a lot to Clifton and Moore for their interest in the bank lot; I could not say when it was done; it must have been in 1877; it has been a good while and I cannot remember. My recollection of these matters of segregation as to dates and details is indistinct, and I have no independent recollection of the dates except as I look at the dates of the instruments which have

been shown me. I could not remember dates for nine years. There was a trade between Durham and I on one side and Clifton and Moore on the other in regard to that bank lot just the same as we had traded other lots, and in trading that fell to us just the same as we had traded lots back and forth all the time in all our town property."

The examination continued:

Q. Isn't it a fact that that lot was originally intended as part of a street or alley, and that Mr. Noah Seiver jumped it?

A. I don't know what you call it. I found a foundation on there and threw it off.

Q. And put one on yourself?

A. I went to sinking a shaft on it to mine. That was about the time they commenced the bank building—in the spring of 1877. I don't remember the date.

Defendant introduces in evidence the deposition of Samuel N. Wood, taken in the State of Colorado and county of Arapahoe, before James T. Lindsy.

Plaintiffs object to the testimony of this witness on the ground that it is incompetent, irrelevant, and immaterial, not tending to prove any issue in the case that can properly arise therein and being as to transactions as to the execution and delivery of instruments of conveyance for this property prior to the entry and
132 patent by the plaintiffs, but not as to its being secondary.

Which objection was overruled by the court, and to this ruling the plaintiffs at the time excepted.

SAMUEL N. WOOD, a witness on the part of the defendant, testified:

I am cashier in the First National Bank of Denver and I resided the greater part of the years 1877, 1878, and 1879 in Deadwood, Dakota. A part of that time I was a member of the firm of Stebbins, Wood and Post, bankers, and the balance of the time I was cashier of the defendant bank. I was familiar with the title to the lot in controversy, where the defendant bank is situated. I knew C. Hoffman in 1877, who owned a half interest in the lot. He conveyed it to W. R. Stebbins in the early part of 1878 or the latter part of 1878, and I saw the deed. I had occasion to examine the title to that lot at the time I made the purchase of that lot from Stebbins for the First National Bank of Deadwood. Hoffman owned one-half and Stebbins, Wood & Post the other half. The interest of Stebbins, Wood & Post, I think, was held by Stebbins, as trustee. I do not know what has become of the Hoffman deed. It is my impression that it was filed for record, but of that I am not positive. I have already made search among my papers, and I am sure I have not got it. I do not know of its whereabouts. Hoffman conveyed his interest to Stebbins and I bought the lot from Stebbins afterwards for the defendant bank.

133 Defendant offers in evidence the deposition of W. R. Stebbins, taken by stipulation on the 15th day of July, 1886, at Deadwood, before Robert C. Hayes, a notary public, filed in this court July 15th, 1886.

To which the plaintiffs interposed the same objection as to the deposition of Samuel N. Wood. This objection was overruled by the court, and to this ruling plaintiffs at the time excepted.

Deposition of W. R. Stebbins.

The witness' deposition was as follows:

"My name is W. R. Stebbins; age, fifty-two; residence, New York; occupation, banking. During the years 1877 and 1878 I resided part of the time at Deadwood and the remainder of the time at Atchison, Kansas. I was engaged principally in banking and dealt in real estate. During those years I was acquainted with the premises known as 'lot No. 2 A,' on Main street, in the city of Deadwood, where a banking business was carried on and where the First National Bank building now stands. I am the William R. Stebbins who, with C. Hoffman, at one time acquired a title by deed of conveyance from Noah Seiver, Edward Durham, and others. I am the William R. Stebbins named in the deed which is handed me, marked 'A' by the notary, signed 'R. C. H.' by him. C. Hoffman transferred his interest in the property derived under that deed to me—to the best of my recollection, it was in the month of July or August, 1877—by a quitclaim deed. My recollection is that he gave me the deed and I deposited it; left it with the banking-house of Stebbins, Wood & Post just before my departure on the 18th day of August, 1877, for Atchison, Kansas. I never saw the deed afterwards. I do not know where it is now. I have not in my possession any papers relating to that property
134 of any kind. Samuel N. Wood was in charge of the business of Stebbins, Wood & Post at the time the deed was left by me. The First National bank succeeded to their business. I delivered all the papers relating to that property to Mr. Wood, of the firm of Stebbins, Wood & Post. I do not know whether the deed from Hoffman to me was filed for record. I do not know where it is now. That deed conveyed the undivided one-half interest of Mr. Hoffman in the lot known as 'No. 2 A' on Main street, then occupied by the banking firm of Stebbins, Wood & Post. It is the same lot now occupied by the First National bank building in the city of Deadwood."

On cross-examination the witness testified:

"My recollection is that the banking-house of Stebbins, Wood and Post ceased doing business in the early part of 1878. The First National Bank of Deadwood commenced to do business in the early part of 1878. I was here in July, 1878. The liquor store of Suessenbach & McCaffrey was almost opposite the First

National bank on Main street, and distant about eighty feet. My recollection is that it was on the same spot that J. K. P. Miller's store now is."

135 DONALD MCPHERSON, called on the part of the defendant, testified as follows:

"I am the cashier of the First National Bank of Deadwood, and have been since July 10th, 1882. I have the custody of the title papers and instruments in writing of that bank. I have made search for a deed of conveyance from C. Hoffman to W. R. Stebbins. I made a very strict search through the papers, and could not find it. The bank has not now the custody of that deed, nor has it under its control. The records of the register of deeds' office were destroyed by fire on the morning of the 26th of September, 1878. I have no knowledge in reference to the whereabouts of this deed."

Defendant offered in evidence a deed from W. R. Stebbins to the First National bank of this property in controversy, which is dated the 10th day of August, 1878, and acknowledged on the 24th day of August, 1878, and which was recorded in the register of deeds' office of Lawrence county on the 31st day of August, 1878, in Book 23, page 54.

To this plaintiffs objected as incompetent, immaterial, and irrelevant, from the fact that it is a mere quitclaim to the defendant bank of the interest of Mr. Stebbins in and to the property, which is dated on the 10th day of August, 1878, at a time when it is shown that the property in question had been entered for patent by some of the plaintiffs and others in the U. S. land office at Deadwood, Dakota; which objection was overruled by the court *pro forma*, and to this ruling the plaintiffs at the time excepted.

The deed is marked Exhibit "K," and is in the words and figures following, to wit:

This deed, made this tenth day of August in the year of our Lord one thousand eight hundred and seventy-eight between
136 W. R. Stebbins of the county of Atchison and State of Kansas of the first part, and the First National Bank of Deadwood, Dakota, of the county of Lawrence and Territory of Dakota of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollars to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has remised, sold and quitclaimed, and by these presents does remise, sell and quitclaim, unto the said party of the second part, its heirs and assigns forever, all the right, title and interest which the said party of the first part has in and to the following-described real estate, situate, and being in the county of Lawrence and Territory of Dakota, to wit:

Lot No. two 2 A on Main street Deadwood, more particularly known as the property located by Noah Seiver, Edward Durham, James A. Hamilton and H. J. Scott, March 15th, A. D. 1877, and

recorded in Book B, page twenty-three of the records of said Deadwood. More particularly described as being situated on Main street in said Deadwood and having a frontage of twenty feet on said Main street and running back to the depth of an hundred feet, it being the property more recently known as the property occupied by the banking-house of Stebbins, Wood & Post. Together with all improvements, and buildings thereon or appertaining thereto, in any way whatsoever; to have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in anywise thereunto appertaining, and all the estate, right, title and interest whatsoever, of the said party of the first part, to the only proper use and benefit of the said party of the second part, its heirs and assigns forever.

In witness whereof the said party of the first part has
137 hereunto set his hand and seal the day and year first above writtwn.

W. R. STEBBINS. [SEAL.]

Signed, sealed, and delivered in the presence of—
SAM. S. LANDON.

STATE OF COLORADO, } *ss:*
County of Arapahoe, }

I, Scott J. Anthony, a notary public in and for said county, in the State aforesaid, do hereby certify that W. R. Stebbins, who is personally known to me as the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 24th day of August, A. D. 1878.

SCOTT J. ANTHONY,
[SEAL.] *Notary Public.*

138 No. 3684. Quitclaim. W. R. Stebbins to First National bank. Territory of Dakota, county of Lawrence, *ss:* I hereby certify that this deed was filed for record in my office at 12.15 o'clock p. m. August 31, 1878, and is duly recorded in Book 23, page No. 511. C. H. McKinnis, clerk and recorder, by R. C. Webster, deputy. Fees, $1.25, p'd.

139 DONALD A. MCPHERSON, on being recalled, testified as follows:

"I have had some little experience in buying and selling real property and renting real property in this town. I have a fair idea of the usual rental value of property—business property. I think I know the reasonable value of the premises in dispute. I have known the property since 1877. I mean by that that I knew its situation up until the fire and have known its situation since. I should say the reasonable value of the use of these premises was

twelve hundred dollars a year from the summer of 1878 to the present time—that is, including both the wooden building that was there and then this present building."

Witness was then asked, "What, in your judgment, would be the value of the lot at this time?"

To which question the plaintiffs objected as incompetent, immaterial, and irrelevant, it being beyond the power of the legislature of Dakota to impose any conditions upon the primary disposal of the soil by the United States or to pass legislation which will entitle any party to recover for betterments placed upon land the title to which is in the United States and by them conveyed to a grantee.

Which objection was overruled by the court *pro forma*, and to this ruling plaintiffs at the time excepted.

Witness continued: "I would place it at from twenty-five hundred to three thousand dollars."

Witness was then asked, "What is the value of the improvements thereon?"

To which question plaintiffs objected for the same reasons as last stated.

This objection was overruled by the court *pro forma*, and to this ruling plaintiffs at the time excepted.

Witness continued: "That building could be erected to-
140 day for six thousand dollars."

Witness was then asked: "You may state who has paid the taxes on that property since the organization of the First National bank."

To which question plaintiffs objected on the ground that the same was incompetent, irrelevant, and immaterial, there being no plea of the payment of taxes by the defendant upon the property and there being no plea that the plaintiffs have not paid the taxes upon the ground patented to them by the United States; which objection was overruled *pro forma* by the court, and to this ruling the plaintiffs at the time excepted.

Witness continued: "The bank has."

Witness was then asked: "Who erected the improvements that exist upon the lot and did at the commencement of this action?"

To which question plaintiff made the same objection as to the previous question as to the value of the lot. The court overruled the objection *pro forma*, and to this ruling the plaintiffs at the time excepted.

Witness continued: "The bank erected the present building. It is a two-story brick building, about 21 by 70 or 75 feet. I am not clear on the depth of the building; about seventy feet, I think. The lower story consists of a banking office and directors' room, in the rear of which are two sets of law offices, two rooms. The upper story is divided into five rooms, I think. The building is covered with tin roof. The bank has kept the building in repair."

Witness was here asked: "I will ask you whether any street improvements have been made in front of the bank."

To which question plaintiffs objected as incompetent and imma-

terial for the same reasons last given; which objection was overruled by the court *pro forma*, and to this ruling the plaintiffs at the time excepted.

141 Witness continued: "There has been permanent improvements made during the past year on the roadway of the street, macadamizing and drainage, under the direction of the city authorities."

Witness was then asked: "Who paid for the street improvements thus made?"

To which question plaintiffs objected as incompetent and immaterial for the reasons last given; which objection was overruled by the court, and to this ruling plaintiffs at the time excepted.

Witness continued: "The First National bank paid their proportion according to the frontage of the lot. There is no doubt of the fact that the banks are located on that corner enhances the value of the lot very much."

On cross-examination the witness testified:

"I have been a resident here since 1877. I came here on the 20th day of May, 1877. The building was erected by the bank in the winter of 1879 and '80, after September, 1879. All the present improvements standing upon that ground have been erected since the month of September, 1879. All the repairs that have been placed on those improvements have been made since 1879. I said the taxes and street improvements had been paid by the bank. Since 1879 the bank has received the rents and profits from that property. I went into the bank in July, 1882. The rentals received during 1882 would not exceed forty dollars per month. The bank itself occupies about forty feet in the main street. There is the main banking-room, the counting-room, and vault. In 1882, I should say, the reasonable rental value of the banking-room, the directors' room, and the vault would not be more than sixty dollars a month, perhaps. The street improvements cost about one hundred and thirty dollars.

142 The proportion of taxes on the building would be about six hundred dollars. I don't think the rents and value of the use and occupation there during that time exceeded the cost of the improvements and taxes. I think it is about a stand-off. The street improvements only apply to one year. I base the value of the property—the building—upon the income that we receive from the upper portion. Now, the bank occupies about a third of the building—the bank proper—and the balance of the building is subject to rental. Our income from the rentals won't average over $550.00 a year. That amount represents the rentals from the rear and upper portion of the building. The main business-room on the main street is occupied by the bank itself. Of course, that is worth more than the other portions of the building. A room that size would not be worth more than $75.00 a month for any ordinary business. It is a small room. It is only twenty feet frontage by twenty-eight, I think—the main room. My personal knowledge of the rental value of property here in town is confined to one or two pieces that I have under my control."

On re-examination the witness testified:

"I estimate the fixtures and all in my calculation."

L. C. MILLER, sworn on the part of the defendant, testified as follows:

"I have resided in Deadwood since 1876. I have had some little experience in buying and selling real estate and renting and leasing of buildings. I know the bank property. I was there when the first and last buildings were erected. I have some pretty good idea, I guess, of the value of the use of that property since 1878. I think
143 that, since July, 1878, take it all through, it is worth probably a hundred dollars a month."

On cross-examination the witness testified:

"I have not had much experience since 1877 in this town in the rental of brick buildings. I have had some with cheaper buildings. I have a general idea of it. I used to have charge of the other corner building and the lots in the rear of it and offices. I rent one in there now. I refer to the Merchants' bank. There is some business that would perhaps give more than one hundred dollars a month for the use and occupation of that building for a part of the time since its erection after the fire in September, 1879, but I think that is fair. I would say the main banking-room ought to rent for $75.00. I think ten dollars a month would be a fair rental for the front room upstairs, occupied by Mr. Hamilton and Mr. Cushman. Since 1879 to the present time ten dollars a month would be a low estimate for it. My inclination, as an expert, is to put a low estimate on it. I am, perhaps, interested in a similar controversy. My wife is interested in a controversy respecting bed-rock and surface titles. I am interested with her, of course. I know the rooms occupied by Messrs. Van Cise & Wilson, two down-stairs and three upstairs. As to the reasonable value of the use and occupation of those rooms since 1879 to the present time, I can judge better from what I pay. I pay fifteen dollars a month, and they have a little more room than I have, but I would not trade with them for my business. I have one big room with one window and no light on either side—just the front light, glass door and skylight. Whatever light there is comes from the front. For my business I would prefer that to their five rooms."

144 NOAH SEIVER, recalled on the part of the defendants, testified as follows:

"The building on the lot in controversy until the fire of 1879 was erected in 1877, in the spring. I think that a building of that discription on the lot in dispute would probably rent for twelve hundred dollars a year."

Witness was then asked: "What would be your estimate of the value of the land, aside from the improvements thereon, at the present time?"

To which question plaintiffs objected as incompetent, immaterial,

and irrelevant for the same reasons given to similar questions; which objection was overruled by the court *pro forma*, and to this ruling the plaintiffs at the time excepted.

Witness answered: "I don't think it would be any more now than it was in 1877, taking the naked lot; that was twenty-six hundred dollars."

WILLIAM SELBIE, sworn on the part of the defendant, testified as follows:

"I have had some experience in hiring and renting buildings and dealing in real property. I have had some little idea of the rental value of property along Main street. From July, 1878, to the time of the Deadwood fire the net value of the property in dispute would probably be about thirteen hundred dollars. Then there were several months that it was worth nothing, while the new building was being erected. From the time the new building was erected probably to the close of 1880 it would be about thirteen hundred dollars a year net. I should judge that about a thousand dollars a year from that on. I have lived in Deadwood since April, 1877,
145 and have known this property all that time. Since November, 1880, I have been doing business next door."

Witness was then asked: "You may state what, in your judgment, would be the value of the land, aside from the improvements."

To which question plaintiffs objected as incompetent, immaterial, and irrelevant for the same reasons heretofore given to similar questions. This objection was overruled by the court, and to this ruling the plaintiffs at the time excepted.

Witness answered: "There is no real market value to the property, of course, to-day, no absolute market value; but, in my opinion, the lot and building together ought to be worth between nine and ten thousand dollars, of which a third would be the lot."

On cross-examination the witness testified:

"By net value of rentals I mean what would be left to the proprietor after he had paid taxes and repairs and any little incidentals of that kind; probably would not cover insurance either, but the actual necessary expenditures. I think the present building was commenced in October, 1879. It was completed some time in the winter, probably in January. I think it was occupied some time early in 1880."

E. C. BENT, sworn on the part of defendant, testified as follows:

"I have lived in Deadwood since July, 1876. I know the property in controversy. I have had experience in buying and selling real estate and hiring and renting of property to a limited extent, especially in buying. I have had such experience that I consider myself able to express an opinion and form a judgment as to the value of the use of property. From July, 1878, to the present time

I should say the net reasonable value of the use of that bank
146 building would be from seventy-five to one hundred dollars a month above taxes and insurance."

On cross-examination the witness testified:

"I knew the old building before the fire; from July, 1878, up to the time of the fire in September, 1879, I would put the reasonable net value of that building at from $75.00 to $100.00 per month; rents were higher then than they are now; this present building on the lot was erected after the fire, the fall and winter of 1879–1880; it was ready for occupancy early in 1880; since early in 1880 the reasonable net value of the use and occupation of those premises would be from $75.00 to $100.00 per month. I have rented property near this myself. I have rented the property opposite, occupied by Mr. Gandolpho as a fruit stand. I think he occupies about ten feet; the building upon it is a small frame building, one story; Joseph Gandolpho erected that himself; the reasonable value of the use of that small piece of ground would depend greatly on circumstances; for some use it would not be worth five dollars a month and for others it would be worth more; Mr. Gandolpho has paid ground rent merely; he has paid various prices; think the highest was in 1879 or 1880, right after the fire, when there was a great demand for buildings. I think he paid as high as thirty-five or forty dollars a month and down as low as twenty or twenty-five; he had a right to occupy the full length of the lot, seventy-five feet deep; that building is perhaps forty or fifty feet. I am acquainted with the building on the corner just opposite the bank; it is about seventeen by fifty feet, a one-story frame; from 1878 to the time of the fire that property would not have been worth anything for mining purposes; for town-site purposes it would have been quite valu-
147 able; it has rented as high as one hundred and fifty dollars a month and as low as seventy-five, for saloon purposes; there is nothing like comparison in value whatever between the improvements upon that piece of property and the improvements upon this piece of property of which I have testified as an expert; the First National bank building is the most valuable as a building; it is a two-story brick building; the net value of the use and occupation of that property since July, 1878, down to the present time would, in my judgment, be from seventy-five to one hundred dollars a month.

On re-examination the witness testified:

I should say that that opposite this bank and property in that vicinity generally have been greatly enhanced in value by the fact of the bank's being there and doing business there.

Here the defendant rested its case.

The plaintiffs, to further maintain the issues on their part and in rebuttal, called the following-named witnesses, who, being duly sworn, testified as follows:

JAMES J. SUTHERLAND, sworn on the part of the plaintiffs, testified as follows:

"I became interested in placer claim No. 15, on Whitewood below discovery, in the early part of 1877; my interest was acquired from Noah Seiver, a man named James Hamilton, a man named Moore, Ed. Durham, and I don't remember whether there was another party or not. I paid the consideration for the acquisition of whatever title was thus acquired; my brother, Frank Sutherland, first started negotiations and talked to me about it, proposed to me that I should buy it, and I went on and consum-ated the trade with those parties.

148 I don't know that anything was said or any agreement made in reference to protecting any one's title to the lot now occupied by the First National Bank of Deadwood. I don't remember of anything."

On cross-examination the witness testified:

"I knew Stebbins, Wood & Post were in possession of the lot at that time. I presume they bought it. I don't know of my own knowledge. I knew they were in possession."

ALVIN FOX, a witness on the part of the plaintiffs, testified as follows:

I know W. R. Stebbins, who was at one time a claimant of the lot upon which the First National Bank of Deadwood now stands. He was here some time during 1878. I could not define accurately the limits of mineral claim 86 of Suessenbach and others, situated within the town of Deadwood, yet I know about where it is. I have lived in Deadwood since July 17th, 1877, and during that time I have known of no other person by the name of W. R. Stebbins claiming any property within the limits of this mineral claim 86 other than the party of whom I have spoken. In the month of June, 1878, Mr. Stebbins did not claim the ownership of any ground within this mineral claim 86 nor any right to it except to this lot now occupied by the First National bank, within my knowledge; that was the only place that I know of.

On cross-examination the witness testified:

I don't know that he had a mortgage on the property adjoining the house of Brown & Thum. He might and he might not. I don't know that he had a mortgage on Progressive hall. It was never brought within my knowledge. I know that he had no title to any real estate excepting this lot; he might have had mortgages and

149 he might have owed Tom, Dick, and Harry. I don't know about that; but I am satisfied that he had no title to any other property but this lot. He thought he had title to that. I never examined the records of the register of deeds' office to ascertain whether he had title to any other lot on that placer claim. I never had occasion to. I know just this much, that Mr. Stebbins intrusted his business to me, not all of

it, but I know very well from what he told me that he had no—I know where lot No. 2, on the north side of Main street, in the city of Deadwood, being the lot adjoining the banking-house of Brown & Thum, on Main street, upon which there was erected a two-story building by C. Hoffman, is situated. I think Mr. Stebbins had a mortgage on it; for how much I don't know. I know he had some dealings with Mr. Hoffman and was secured on the property.

NOAH SEIVER, recalled on the part of the defendants, testified as follows:

"I was born in Rockingham county, Virginia. I was 54 on the 4th of July last. During all of the year 1877 I was a native-born citizen of the United States."

It is admitted that W. R. Stebbins was a citizen of the United States in 1877–'8.

150–152 Defendant moves that upon the evidence now presented and the pleadings in this case a verdict be directed for defendant or the court discharge the jury and render a judgment for the defendant.

Ruling reserved.

Whereupon the court proceeded to hear argument of counsel for and against the motion, which lasted from January 17th, 1887, until January 22nd, 1887, on which date the court excused the jury until further order from the consideration of the case until after the return of the judge from attendance on the session of the supreme court to be held at Bismarck, Dakota, in February following.

Thereafter and on the 3rd day of March, 1887, court was opened by the judge and the jury in this case called, who answered to their names, and said jury was again excused by the court in said cause until notified again to attend.

Thereafter and on the 30th day of April, 1887, the January term, 1887, of said court, was by it adjourned until July 5th, 1887, on which last-named day the said court adjourned *sine die* and the jury in this case were discharged.

And thereupon and thereafter, to wit, on the 15th day of August, 1887, at the August term of said court, said motion of defendant made on said 17th day of January, 1887, came on for further hearing, and the court, having considered the same, sustained said motion to find for defendant; to which ruling and decision the plaintiffs at the time excepted, and thereupon the court made & filed its decision in writing, the same being the findings of fact & conclusions of law now on file and of record in this case.

153 TERRITORY OF DAKOTA, } ss:
First Judicial District, }

In the District Court within and for Lawrence County.

HENRY SUESSENBACH, HUGH MCCAFFREY, DANIEL MCLAUGHLIN, and WILLIAM R. STEELE, Plaintiffs,
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, DAKOTA, Defendant.

This cause having heretofore been called for trial, and a jury having been called herein to try the issue made by the pleadings properly triable to a jury, and the issues made by the equitable defense and counter-claim having been tried at the same time to the court, and the court having heard the testimony adduced and the argument of counsel, and being satisfied that the equitable issues submitted by defendant's answer and counter-claim should be found in defendant's favor, thereupon the court discharged the jury from the further consideration of the case and now makes the following:

Findings of Fact.

I.

That on the 28th day of February, 1877, the land in controversy in this action and the land contiguous thereto and surrounding it was a part of the unappropriated public domain of the United States and was land valuable for minerals and contained valuable mineral deposits, to wit, gold, and was what is known and called as placer ground, and upon that day Noah Siever, Edward Durham, William Moore, and Thomas Clifton were citizens of the United States
154 and had theretofore entered upon and explored the same and discovered valuable mineral deposits therein, to wit, gold, and on the 16th day of March, 1877, the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton duly located, claimed, and appropriated the same as placer mining ground, the same being known and called placer claim No. 15 above discovery, on Whitewood gulch, in Whitewood mining district, Lawrence county, Dakota, in accordance with the laws of the United States, the local laws and the customs, rules, and regulations of miners in force in said mining district, by distinctly marking the surface boundaries of said claim so that they could be readily traced on the ground by setting substantial stakes at each corner of said claim and on the sides thereof, with the name of the claim marked thereon and the name of the locators, and by putting a plain sign and notice at the point of discovery thereon, containing the name of the claim, as placer claim No. 15 above discovery, and the names of the locators, to wit, Noah Siever, Edward Durham, William Moore, and Thomas Clifton, and the dates of the location, to wit, March 16th, 1877, and by filing and recording a certificate of said location in the records of the recorder of said Whitewood mining district, and said locators remained in continuous possession of said placer claim, work-

ing and developing the same, until their sale and transfer thereof, as hereinafter stated.

II.

That during the months of March and April, 1877, said Noah Siever and his said associates expended more than five, 5, hundred dollars in value in labor and improvements upon — in working and developing said placer claim No. 15, said placer claim No. 15 containing not to exceed four acres and no more than was al-
155 lowed by the local laws, rules, and regulations in force in said mining district.

III.

That on the 28th day of March, 1877, the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, being thus the owners of and in actual possession of said placer claim No. 15 as aforesaid, claiming the same under the mineral land laws of the United States, for a valuable consideration made, executed, and delivered to William R. Stebbins and C. Hoffman, who were citizens of the United States, their deeds of conveyance for a portion of said placer mining claim, described in said deed as lot No. 2 A, on Main street, in the town of Deadwood, county of Lawrence and Territory of Dakota, and being the same premises which are in controversy in this action, and then and there delivered possession of said premises to said Stebbins and Hoffman, which deed was afterwards filed for record in the register of deeds' office of Lawrence county on the 25th day of April, 1877, and recorded in vol. No. A, page 77, of the records of said office, and which deed of conveyance was in the words and figures following, to wit:

Noah Siever, Edward Durham, William Moore, and Thomas Clifton, of Deadwood, Lawrence county, Territory of Dakota, agree with William R. Stebbins and C. Hoffman, of the same place, that in consideration of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, the said Stebbins and Hoffman have full right to occupy and possess lot number 2 A, on Main street, in the town of Deadwood, county and Territory aforesaid. The said Noah Siever, Edward Durham, William Moore, and Thomas Clifton being the owners of placer claim number fifteen (15), above discovery in Whitewood mining district, county and Territory aforesaid, hereby deeding and conveying to said Steb-
156 bins and Hoffman all their claim, right to possess, or title they may have by reason and virtue of said placer claim to said premises, excepting the right to mine for gold under said premises, and then such mining to be done after reasonable notice given to said Stebbins and Hoffman, and all reasonable precaution in carrying on said mining to be used to prevent damage and injury to said premises.

In witness whereof we hereunto set our hands and seals. Done

at Deadwood, Lawrence county, Territory of Dakota, this 28th day of March, A. D. 1877.

NOAH SIEVER. [L. S.]
EDWARD DURHAM. [L. S.]
WILLIAM MOORE. [L. S.]
THOMAS CLIFTON. [L. S.]

In the presence of—
E. C. BREARLEY.

IV.

That prior to the execution of the conveyance last named said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, having agreed with owners of other placer claims immediately contiguous to said placer claim No. 15, to wit, Nos. 13 and 14, laid out and platted a town or city upon their claims 13, 14, and 15, calling it Deadwood, agreeing that the owners of each placer claim respectively should be the owners of the lots and blocks of said town or city within the limits of such claim. Subsequently, by allotment and segregation of interests, the said Noah Siever and Edward Durham became the sole claimants to lot No. 2 A, on Main street, in Deadwood, the premises now in controversy, and being a part of said placer claim No. 15.

V.

That prior to the conveyance of March 28th, 1877, from Siever, Durham, Moore, and Clifton, set out in the 3rd finding
157 hereof, said Siever and Durham had employed James A. Hamilton and H. J. Scott to aid them in constructing a building on said lot No. 2 A as aforesaid, and for their aid had promised them an interest in said lot and in said building; and on the 27th day of March, 1877, the said Noah Siever, Edward Durham, James A. Hamilton, and H. J. Scott, for a valuable consideration, to wit, three thousand dollars, then paid to them by said Stebbins and Hoffman, made, executed, and delivered to the said W. R. Stebbins and C. Hoffman a deed to the said lot 2 A, the premises in controversy, and, for the purpose of enabling the same to be filed for record, on the 20th of April, 1877, acknowledged said deed, and said deed was on the 20th of April, 1877, recorded in Book A of Deeds, at pages 24 and 25, of the records of the register of deeds' office for Lawrence county. Said last-mentioned deed is in words and figures following, to wit:

This indenture made the 27th day of March, A. D. 1877, between Noah Siever, Edward Durham, James A. Hamilton and H. J. Scott, of Deadwood, Lawrence county, Territory of Dakota parties of the first part, and William R. Stebbins and C. Hoffman of the same place, parties of the second part, witnesseth,

The said parties of the first part for and in consideration of the sum of three thousand dollars to them in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, have remised, released and forever quitclaimed and by these presents do remise, release and forever quitclaim unto the said parties of the second part and to their heirs and assigns—all

of the following real estate or landed claim or possessory right or property situate and being in Deadwood, Lawrence county, Territory of Dakota, to wit, lot number two (2) A, as
158 located by the parties of the first part March 15th, A. D. 1877 and recorded in Book B page twenty-three of the records of said Deadwood, the lot number two (2) A is more particularly described as being situate on Main street in said Deadwood, having a frontage of twenty (20) feet on said Main street and running back to the depth of one hundred feet. There is now upon said lot one two-story building—nearly completed—with a frontage of twenty feet and a depth of fifty feet. Together with all the rights privileges and franchises thereunto incident appendant or appurtenant or therewith usually had and enjoyed; and also all and singular the tenements hereditaments and appurtenances thereto belonging or in anywise appertaining and the rents issues and profits thereof and also all the estate right title interest property possession claim and demand whatsoever as well in law as in equity of the said parties of the first part of in or to the said premises and every part and parcel thereof with the appurtenances, to have and to hold all and singular the said premises and privileges thereto incident unto the said parties of the second part, their heirs and assigns forever. And the said Noah Siever, Edward Durham, James A. Hamilton and H. J. Scott for themselves and their assigns and representatives do hereby covenant and agree that they have full right and power to deed and convey the said premises and that this conveyance does convey to said William R. Stebbins and C. Hoffman, parties of the second part, their heirs and assigns the full possession, right of possession and property in and to said lot number two (2) A, as against any individual, individuals, corporation or corporations whomsoever or whatsoever notwithstanding, forever. And the parties of the first part do further agree that they will maintain and de-
159 fend and that they do hereby warrant and agree to sustain and defend the title and possession of the said parties of the second part to the said premises as against any individual, individuals, corporation or corporations. The said parties of the first part further agree that if any suit or suits be commenced against the said parties of the second part involving the title to or the right of possession of the property herein conveyed the said suit or suits will be defended and contested at the sole expense and cost of the parties of the first part, who hereby solemnly agree to keep said parties of the second part free and clear of any costs or damages that may occur by reason of any litigation in the premises.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

NOAH SIEVER, [L. S.]
EDWARD DURHAM, [L. S.]
JAMES A. HAMILTON, [L. S.]
H. J. SCOTT. [L. S.]

Signed, sealed, and delivered in presence of—
E. C. BREARLY,
JOHN WOLZMUTH,
CHRISTIAN FLUKEN.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

On this 20th day of April, A. D. 1877, before me, a notary public within and for said county and Territory, personally came the above-named Noah Siever, Edwa-d Durham, James A. Hamilton, and H. J. Scott, who are personally known to me to be the identical persons whose names are affixed to the above deed as grantors, and they acknowledged the same to be their free act and deed.

Witness my hand and seal this the date aforesaid.

[SEAL.] JAMES A. HAND,
Notary Public.

160 VI.

This building, thus erected by Siever, Durham, Hamilton, and Scott, was a two-story frame building about twenty feet front on Main street by sixty feet deep, the possession of which was delivered to said Stebbins and Hoffman on or about the 21st of April, 1877. Said building and lot was used as a bank by the banking firm of Stebbins, Wood & Post and for offices used and rented by them, the said William R. Stebbins being a member of the firm of said Stebbins, Wood & Post.

VII.

On or about August 1st, 1877, the said C. Hoffman for a valuable consideration sold and by a quitclaim deed conveyed to the said William R. Stebbins all his right, title, and interest in and to said lot number two (2) A, the premises in controversy; which said deed was, on or about said date, filed for record and duly recorded in the office of the register of deeds of said Lawrence county.

VIII.

Said banking firm of Stebbins, Wood & Post continued to occupy and possess under said conveyances and delivery of possession the premises until about July, 1878, when the present defendant, The First National Bank of Deadwood, was organized as a national bank under the laws of Congress and succeeded to the business of said Stebbins, Wood & Post and immediately went into possession and control of the said property described as lot No. 2 A; and, by deed dated the 10th day of August, 1878, and acknowledged on the 24th day of August, 1878, the said William R. Stebbins sold, transferred, and conveyed said property to the defendant bank, which deed was filed for record August 31st, 1878, and duly recorded in Book 23,
page 54, of the records of the register of deeds' office of said
161 Lawrence county, and said defendant, The First National Bank of Deadwood, Dakota, has continued in possession of said disputed premises ever since the delivery of possession to it by the said Stebbins, Wood & Post, in July, 1878.

IX.

That on or about June 26th, 1877, the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, being in possession

of said placer claim and claiming to be the owners thereof by virtue of said location heretofore stated, subject to the rights theretofore transferred by them to said Stebbins and Hoffman, for the consideration of $1,600 sold to F. T. Sutherland, H. F. Lake, and J. J. Sutherland all their right, title, and interest in and to said placer claim No. 15 and gave to the said Sutherland, Lake, and Sutherland a bill of sale therefor, which was on said date filed in the office of the recorder of the mining district, who was then the said J. J. Sutherland. At the time of the execution of this bill of sale said Noah Siever and his associates delivered to the said Sutherland, Lake, and Sutherland possession of that portion of said placer claim the possession to which remained in them, but expressly reserved therefrom said lot No. 2 A, theretofore conveyed by them, as hereinbefore stated, to Stebbins and Hoffman and of which said Stebbins and Hoffman were then in possession; and, as a part of the consideration for the sale of said placer claim No. 15 to said Frank T. Sutherland, H. F. Lake, and J. J. Sutherland, they, the said Sutherland, Lake, and Sutherland, agreed with said Noah Siever and his associates to protect and defend and respect the title and possession of the said William R. Stebbins and C. Hoffman to that part of placer claim No. 15 described as said lot No. 2 A, on Main street,
Deadwood, and to keep and make good to them or their heirs
162 and assigns the covenants contained in the said deeds of
Siever, Durham, Clifton, and Moore and of Siever, Durham, Hamilton, and Scott to the said Stebbins and Hoffman, hereinbefore set forth.

X.

That on the 25th day of July, 1877, the said J. J. Sutherland sold his interest in placer claim No. 15 to F. T. Sutherland, and on the same day the said F. T. Sutherland sold and conveyed such J. J. Sutherland interest to Edward Welch; that on January 5th, 1878, H. F. Lake sold and conveyed his interest to Hugh McCaffrey and Henry Suessenbach, two of the plaintiffs herein.

XI.

That on the 29th day of January, 1878, Edward Welch and Frank T. Sutherland, Hugh McCaffrey, and Henry Suessenbach filed in the office of the register of deeds of Lawrence county and had recorded in Book B, miscellaneous records of said office, at page 324, an instrument in words and figures following, to wit, as an amended location certificate of said placer claim No. 15.

"Notice is hereby given that the undersigned, for the purpose of more clearly defining the boundaries of placer claim No. 15 above discovery, on Whitewood placer mining district, Lawrence county, Dakota Territory, do, on this the 28th day of January, 1878, file this our amended certificate, and described more particularly as per survey of the annexed field-notes.

(Signed) EDWARD WELCH.
FRANK T. SUTHERLAND.
HUGH McCAFFREY.
HENRY SUESSENBACH."

Appended to this were field-notes made by Henry Rohleder, surveyor, showing courses, distances, and describing the
163 tract as containing three and $\frac{46}{100}$ acres.

XII.

That on the 15th day of May, 1878, the said F. T. Sutherland, Hugh McCaffrey, Henry Suessenbach, and Edward Welch, by Frank Welch, administrator, the said Edward Welch having in the meantime died, filed in the United States land office at Deadwood, D. T., an application for patent for said placer claim No. 15 above discovery. The application to enter was sworn to by said Frank T. Sutherland. In said application the said Sutherland, McCaffrey, Suessenbach, and Welch traced their title to and claimed said entry under and by virtue of said location of said placer claim made on the 16th day of March, 1877, by said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, heretofore stated, and claimed the right to make said entry and obtain title to said premises under and by virtue of said location, and there was appended to said application as a part thereof an abstract of title from the records of the Whitewood mining district as follows:

Abstract of Title, Claim No. 15.

Claim No. 15 above discovery was located January 19th, A. D. 1876, by F. H. Wilkins. See Book A, page 36.

August 19, 1876, one-half interest relocated by Edward Durham, Noah Siever, Thomas Clifton, and William Moore. See Book A, page 69.

March 22nd, 1876, contract to transfer, for work, to J. A. Hamilton if filled. See Book A, page 99.

July 11th, 1876, bill of sale from W. A. Gamble and J. Stien to T. Clifton and W. Moore, one-half interest. See Book A, page 151.

March 15, 1877, relocated by J. H. McCutcheon. See Book A, page 216.

March 16, 1877, relocated by Noah Siever, E. Durham,
164 Thomas Clifton, and William Moore. See page 216.

June 26, 1877, bill of sale from Noah Siever, E. Durham, Thomas Clifton, and William Moore to F. T. Sutherland, Henry Lake, and J. J. Sutherland. See page 257.

July 25, 1877, bill of sale for one-third interest from J. J. Sutherland to F. T. Sutherland."

From the office of the register of deeds the following:

"*Abstract of Title, Placer Claim No. 15 Above Discovery, Whitewood Placer Mining District, Lawrence County, Dakota Territory.*

Edward Welch, Frank T. Sutherland, Hugh McCaffrey, and Henry Suessenbach, relocators.

Certificate and survey dated January 28th, 1878; filed January 29th, 1878; recorded in Book B, page 324; amended location certificate with field-notes of survey attached.

F. T. Sutherland to Edward Welch; deed dated July 25th, 1877; acknowledged July 25th, 1877; filed July 25th, 1877; consideration, two thousand dollars; an undivided one-third interest.

H. F. Lake to Hugh McCaffrey and Henry Suessenbach; deed dated January 5th, 1878; acknowledged January 5th, 1878; filed January 17th, 1878; recorded in Book F, page 152; consideration, one thousand dollars; an undivided one-third interest."

XIII.

That thereafter such proceedings were had pursuant to said application for patent, as hereinbefore stated, that on July 16th, 1878, an entry and purchase of said placer claim No. 15 above discovery was made at said United States land office at Deadwood, Dakota, in the names of said F. T. Sutherland, Hugh McCaffrey, Henry Suessenbach, and Frank Welch, administrator of Edward Welch, said claim being designated in the entry and purchase as mineral lot No. 86. Thereafter, pursuant to such entry and purchase, patent of the
United States issued for said mineral lot No. 86 to said F. T.
165 Sutherland, Hugh McCaffrey, Henry Suessenbach, and the
heirs of Edward Welch, which patent bears date February 15th, 1882, and was filed for record August 21st, 1882, and recorded in Book No. 20, page 15, of the records of the register of deeds' office of said Lawrence county, the said F. T. Sutherland, patentee, being the same F. T. Sutherland, one of the purchasers of said placer claim from Siever, Durham, Moore, and Clifton.

XIV.

That on the 16th day of July, 1878, said F. T. Sutherland sold and conveyed all his right, title, and interest in and to said placer claim No. 15 to Hugh McCaffrey and Henry Suessenbach by deed of that date, filed for record July 21st, 1882, and recorded in Book No. 20, page 428, of the records of said register of deeds' office.

XV.

That on or about the 5th day of August, 1882, the heirs of Edward Welch, to wit, Frank Welch, Samuel Welch, Mary Welch, Lydia Welch, and Mary Franklin, sold and conveyed all their interest in said placer claim No. 15 to Henry Suessenbach by deed of that date, filed for record August 5th, 1882, and recorded in Book No. 26, page 75, of the records of said office.

XVI.

That on or about August 10th, 1882, Henry Suessenbach and Hugh McCaffrey sold to Daniel McLaughlin and William R. Steele, by deed of that date, an undivided one-fourth interest in and to certain portions of said mineral lot No. 86, including the premises in dispute.

XVII.

The ground claimed by the defendant under the chain of
166 title set out in these findings is identical with that described

in the complaint and claimed by the plaintiffs as a part of mineral lot No. 86. The defendant has occupied the said lot continuously after its organization, in 1878, up to this time. On September 26th, 1879, the building thereon erected by the said Durham, Moore, Hamilton, and Scott and sold with the lot to the said Stebbins and Hoffman was destroyed by fire, and thereupon the defendant immediately erected on the same ground and had finished and ready for occupancy January 1st, 1880, a two-story brick building, 21 x 70 feet; of the value of $10,000.00, which since January 1st, 1880, has been continuously occupied by the defendant as a bank and for offices.

XVIII.

That at the time of each and every of the conveyances to the plaintiffs they had full notice and knowledge of the claim of title by the said Stebbins and Hoffman and by the defendant bank.

XIX.

That the defendant has been at all times ready and willing, and is now ready and willing, and has offered to pay its just and full proportion of all the expenses attending the procuring of the patent title from the United States.

XX.

The title acquired by the plaintiffs under the patent from the United States came to them through the location of said placer claim No. 15, made by the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton March 16th, 1877, no other location of said placer claim No. 15 having been made by the said plaintiffs or their grantors or any of them.

Dated Deadwood, Dakota, Oct. 6th, 1887.

CHAS. M. THOMAS, *Judge.*

167 *Conclusions of Law.*

The court states as conclusions of law on the aforegoing findings:

I.

At the time of the conveyance set out in the findings of fact herein by Noah Siever, Edward Durham, William Moore, and Thomas Clifton to William R. Stebbins and C. Hoffman and by said Siever, Durham, Hamilton, and Scott to said Stebbins and Hoffman said placer claim No. 15, which included the premises thus conveyed and in controversy herein, was a valid and subsisting mining location, and such location and the right to the possession thereof and the title thereto was in said grantors, and such location amounted to a grant by the Government of the United States to the said Siever, Durham, Moore, and Clifton of the exclusive right of possession thereof, together with the right to acquire the absolute title from the Government, so long as they continued to comply with the laws of Congress and with the local laws, rules, and regulations governing

such location, and they had the power and authority to convey and assign such right of possession and the right to purchase and complete the title to the said Stebbins and Hoffman, and said Stebbins and Hoffman could transfer such right to this defendant, and by the conveyances set out in said findings the locators of said claim did transfer to said Stebbins and Hoffman and said Stebbins and Hoffman did transfer to the defendant such right of possession and the right to acquire from the Government the full title to said disputed premises by patent, and the Government held such title in trust for said Siever, Durham, Moore, and Clifton and their said transferees.

II.

Said Stebbins and Hoffman having paid the said locators the
168 full purchase price of said premises and been admitted into possession thereof by them, and said F. T. Sutherland, Lake, and J. J. Sutherland having agreed to make good the covenants and agreements of said Siever, Durham, Moore, and Clifton and said Siever, Durham, Hamilton, and Scott, and to protect said Stebbins and Hoffman and their transferees in their possession and right to the possession of said premises as a part consideration for the purchase by them of said placer claim, they, the said F. T. Sutherland, Lake, and J. J. Sutherland, were bound by said agreement, and so also were their grantees and those claiming under them, said grantees, and all parties having full notice of said agreement and of the right under which said Stebbins and Hoffman and their transferees and this defendant held said premises. These arrangements and agreements between all the parties constituted an assignment of the contract to purchase which the location constituted between the Government and the locators, with an agreement on the part of the locators and their grantees to complete the purchase and perfect the title to said premises in dispute for the benefit of said Stebbins and Hoffman and their assigns, including this defendant.

III.

When the said Frank T. Sutherland, Hugh McCaffrey, Henry Suessenbach, and the heirs of Edward Welch took the title to mineral lot No. 86 by patent of the United States bearing date February 15th, 1882, such title was acquired as to that part of said placer claim described in the complaint and was held by them in trust for the defendant, and, the present plaintiffs having taken and the present plaintiffs now holding the title thus acquired by patent
by Sutherland, McCaffrey, Suessenbach, and the heirs of
169 Edward Welch, they hold the said title to the disputed premises in trust for the defendant and should convey said property to it.

IV.

That plaintiffs are not entitled to recover in this action, and a decree should be entered for defendant dismissing the complaint on the merits of the action and enjoining the plaintiffs from further

prosecuting or maintaining the action for recovery of the possession of the lot or premises described in said complaint or from making any claim thereto under the title alleged in said complaint.

V.

That upon payment or tender of the defendant's proportionate share of the expenses of making the entry and obtaining the patent to the said mineral lot No 86 the plaintiffs should make, execute, and deliver to said defendant a proper deed of conveyence of the lot and land in controversy, which proportionate share, if not agreed upon between the parties, may be ascertained by plaintiffs making proper application to the court, and if plaintiffs decline to produce proof of such costs and expenses within ten days from the entry of judgment herein that they be compelled to make such deed without such tender or payment.

VI.

That upon a failure of said plaintiffs for thirty days after the entry of judgment herein to make such deed that the clerk of this court be appointed a commissioner to make such deed for said property in the name of said plaintiffs to said defendant, and plaintiffs should pay the costs of this action.

Let judgment be entered accordingly.

Oct. 6, 1887.

CHAS. M. THOMAS, *Judge.*

To which findings of fact and conclusions of law the plaintiffs at the time duly excepted.

CHAS. M. THOMAS, *Judge.*

(Endorsed:) In district court, Lawrence county. Henry Suessenbach *et al. vs.* The First Nat'l Bank. Findings of fact, &c., by the court. Filed Oct. 7th, 1887. W. H. Jones, clerk.

170 TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

In District Court, First Judicial District.

HENRY SUESSENBACH, HUGH MCCAFFREY, DANIEL MCLAUGHLIN, and WILLIAM R. STEELE, Plaintiffs,
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, DAKOTA, Defendants.

Motion to Set Aside and Correct Certain Findings of Fact and Conclusions of Law Made by the Judge of the Court in This Case.

Now come the plaintiffs above named and move the court to set aside certain findings of fact and certain conclusions of law and the decision of this court heretofore made in this case on October 6th, 1887, and filed herein on the 7th day of October, 1887, and to cor-

rect said findings, conclusion, and decision in the particulars hereinafter specified, to wit:

I.

Strike out finding of fact number one (1), because the same is immaterial, irrelevant, and incompetent in this:

1. The United States patent offered and received in evidence on the part of the plaintiff is and was conclusive of the regularity of its issue and the action of the Land Department in issuing it, and is not open to review in this court.

2. The patent conveyed the title in fee from the United States to the mineral land described in it to the patentees therein named, burthened with no conditions or equities except those named in it.

3. That no rules, regulations, or customs of the miners, no local laws passed by the legislature of Dakota Territory, and no
171 acts of the alleged locators of placer claim No. 15 above discovery, on Whitewood gulch, on March 16th, 1877, could impair the right of the Government to dispose of the soil within the limits of said claim to the patentees named.

4. The right of said alleged locators under the United States law to said claim was to occupy it for the purpose of mining, and they sold and transferred this right and delivered the possession of the same April 13th, 1877, to Frank J. Sutherland, H. F. Lake, and J. J. Sutherland, as the evidence introduced by the defendants show.

5. That the document called "an exemplified copy of the proceedings under which the plaintiffs' patent was acquired from the office of the Commissioner of the General Land Office at Washington," under date of January 19th, 1884, admitted in evidence over plaintiffs' objection to the same, shows that Henry Suessenbach, Hugh McCaffrey, Edward Welch, and Frank J. Sutherland, relocators of placer claim 15 above discovery, on Whitewood, filed their amended location certificate of said claim on the 29th of January, 1878, in the register of deeds' office, in Lawrence county, Dakota Territory, and thereafter said relocators applied for a patent to said claim fifteen at the United States land office in Deadwood on May 15th, 1878, and entered and paid for the same on July 16th, 1878; that on July 13th, 1878, the defendant's grantor, W. R. Stebbins, along with fifteen others, assuming and claiming to be occupants of town lots on said placer claim No. 15, filed a sworn protest but made no adverse claim in said Deadwood land office against said application for patent, and therefore he waived his adverse claim to the ground in controversy; that said protest was passed upon by the land department and no exception was made in favor of said protestant in the patent issued.

172 6. That defendant's title came to it after such waiver by quitclaim deed from said W. R. Stebbins in the latter part of August, 1877, and after the United States had sold the land within the limits of said placer claim to the applicants named in said patent, and it took such title with knowledge of these facts; and therefore the defendant has no equity against the Government and can assert none against its grantees for the lot in controversy.

II.

Strike out *in* finding of fact number two (2) for the same reasons as are given for striking out number one.

III.

Strike out finding of fact number three (3) for the same reasons as are given for striking out number one, and for the further reasons that the deed of conveyance of lot 2 A of date March 28th, 1877, conveyed no interest in the soil of said lot; that the only right which Sevire, Durham, Clifton, and Moore had in and to it arose from their location of the ground as a mining claim, and that gave them the right to occupy for mining purposes only, and they could not transfer any greater right than they possessed to Stebbins and Hoffman. Besides, the deed mentioned is only a quitclaim, and the grantees named are conclusively presumed to have known that the said lot was mineral land, and that the title to the same was in the United States at the time they accepted it, and it is not shown that Stebbins or Hoffman or those under whom they claimed ever took any steps to acquire the Government title or to keep alive their right of occupancy by doing the annual representation work required to be done thereon by the mining laws.

IV.

173 Strike out finding of fact number four (4) for the same reasons as are given for striking out finding number one, and for the further reason that it is not shown that the agreement between the alleged locators of placer claim No. 13, 14, and 15 or some memorandum thereof was in writing, and therefore was null and void as being an agreement for an interest in land.

V.

Strike out finding of fact number five (5) for the same reasons as are given for striking out finding number three, and for the further reasons that the deed of conveyance of lot 2 A of date March 27th, 1877, from Sevier, Durham, Hamilton, and Scott to Stebbins and Hoffman was a quitclaim deed merely, with certain personal covenants contained therein, and they are conclusively presumed to have known at the time the true state of the title they were purchasing—that it was public mineral land of the United States, and it is not shown that the grantors or grantees named ever took any steps to acquire the Government title or to keep their right of occupancy alive by doing the annual representation work thereon required by the law to be done.

VI.

Strike out finding of fact number six (6) for the same reasons as are given to finding number one, and for the further reasons that it appears that the building mentioned was used as a bank by the banking firm of Stebbins, Wood & Post and for offices used and

rented by them, and such improvement was not intended to aid and assist in carrying on mining operations on the ground or benefitting the claim.

VII.

Strike out finding of fact number seven (7) for the reasons given to finding number one, and for the further reason that the conveyance is stated to be a quitclaim.

174

VIII.

Strike out finding of fact number eight (8) for the same reasons as are given to finding number one, and for the further reasons following:

1. It is shown that Stebbins conveyed his interest to and in lot 2 A to the defendant not earlier than August 24th, 1878, more than thirty days after claim number 15, M. C. 86, had been entered and paid for at the United States land office in Deadwood, Dakota, and more than thirty days after he had waived any adverse claim that he might have to any part of said mineral claim No. 86 by his failure to adverse the application of Henry Suessenbach, Hugh McCaffrey, the heirs of Edward Welch, deceased, and Frank J. Sutherland for a patent to said claim.

2. Stebbins' deed of conveyance to the defendant bank is a quitclaim, and it is conclusively presumed to have been taken with full knowledge of his title to lot 2 A.

3. The fact is wholly immaterial that the premises were used for banking purposes except as showing that the ground was not occupied for mining purposes by the defendant bank or its grantors at any time since March 27th, 1877.

4. That the continued possession by the defendant of said lot 2 A is not a fact from which any right can flow to it, but one which entitles the plaintiff to damages for a wrongful withholding.

IX.

Strike out finding of fact number nine (9) for the reasons given to finding number one, and for the following additional reasons:

1. Said finding as to an agreement and sale of placer claim number 15 on June 26th, 1877, by Sevier, Durham, Moore, and Clifton to F. J. Sutherland, H. F. Lake, and J. J. Sutherland, "sub-
175 ject to the rights theretofore transferred by them to said Stebbins and Hoffman," and stating "said Noah Sevier and his associate delivered to the said Sutherland, Lake, and Sutherland possession of that portion of said placer claim the possession to which remained in them, but expressly reserved therefrom lot 2 A, theretofore conveyed by them, as hereinbefore stated, to Stebbins and Hoffman," and also stating that "they, the said Sutherland, Lake, and Sutherland, agreed with said Noah Sevier and his associates to protect and defend and respect the title and possession of the said William R. Stebbins and C. Hoffman to that part of placer claim No. 15 described as said lot 2 A, on Main street, Deadwood,

and to keep and make good to them or their heirs and assigns the covenants contained in the said deeds of Sevier, Durham, Hamilton, and Scott to the said Stebbins and Hoffman, hereinbefore set forth," are not sustained by any testimony in the case; that the only testimony having relation to this matter offered on the trial of this case is a record in Mining Record Book A, page 257, recorded June 26, 1877 (bill of sale Noah Sevier, Edward Durham, Thomas Moore, and William Clifton to Frank J. Sutherland, H. F. Lake, and J. J. Sutherland, of placer claim No. 15, dated April 13, 1877), which defendant offered and it was received in evidence over the objection of plaintiffs, and the testimony of Noah Sevier, a witness for the defendant, whose testimony was received by the court over plaintiffs' objection, and was as follows:

2. Said testimony of Sevier was incompetent under section 921 of the Civil Code of Dakota relating to contracts in writing and does not support the finding that the grantees in that bill of sale agreed

"to protect and defend and respect the title and possession of
176 the said William R. Stebbins and C. Hoffman to that part of lot 2 A, on Main street, Deadwood, and to make good to them or their heirs and assigns the covenants contained in the said deeds of Sevier, Durham, Hamilton, and Scott to the said Stebbins and Hoffman, hereinbefore set forth."

3. The record of the bill of sale contains no agreement of the kind stated, and shows that the possession of placer claim No. 15 was delivered by Sevier, Durham, Moore, and Clifton to the Sutherlands and Lake at the time and as part of the sale of the same April 13th, 1877, and the testimony of Sevier as to any oral agreement to modify or limit the grant by said conveyance was incompetent.

X.

Strike out finding of fact number ten for the same reasons as are given to finding number one.

XI.

Strike out finding of fact number eleven for the same reasons as given to finding number one.

XII.

Strike out finding of fact number twelve for the reasons stated to finding number one, and for the further reasons:

1. That the matters recited do not show that the defendant or any of its predecessors in interest ever sought to acquire the Government title to the lot in controversy or took any steps towards obtaining a patent for the same.

2. That the finding states incorrectly that "in said application the said Sutherland, McCaffrey, Suessenbach, and Welch traced their title to and claimed entry under and by virtue of said location of said placer claim made on the 16th day of March, 1877, by said Noah Siever, Edward Durham, William Moore, and Thomas Clifton," because said last-named parties had no title to said claim—only a mere right of possession so long as they complied with the

laws, rules, and regulations relating to mining claims, and
177 that they sold and delivered this right of possession to placer claim No. 15 on April 13th, 1877, to the two Sutherlands and H. F. Lake, who merely acquired by this transaction a right to the exclusive possession of the claim; that the title was in the Government and no attempt had been made to acquire it; that later J. J. Sutherland and H. F. Lake sold and transferred their right of possession to some of the applicants for patent to said claim; that said applicants, Henry Suessenbach, Hugh McCaffrey, Edward Welch, and Frank J. Sutherland, as relocators, filed an amended location certificate of claim in the office of the register of deeds of Lawrence county, Dakota Territory, on or about January 29th, 1878, and thereafter on May 15th, 1878, applied to enter and purchase the title to said claim at the land office in Deadwood, D. T., from the United States, who was then the absolute owner of the same.

3. That this right of entry only accrues when, in addition to the right of possession for mining purposes under a valid location of the ground as a mining claim, the applicant to enter has the claim officially surveyed by or under the direction of the U. S. surveyor general, and the survey, including plat and field-notes of the same, *are* approved by him, and the officers of the land office notified of such fact.

4. That the plaintiffs trace their title to the lot in controversy to the United States and to no other source, as is evident from the allegations in their complaint and the proof they offered to support them, to wit, the patent offered and received in evidence in this case.

4. The patent is conclusive that all antecedent steps to entry and its issue were properly taken, and that all adverse claims to the ground in controversy were waived or determined in favor of the applicants before entry.

XIII.

Strike out finding of fact number seventeen for the reasons
178 given to finding number one.

XIV.

Strike out finding of fact number eighteen for the reasons given to finding number one, and for the further reason that there is no testimony in this case, except the oral testimony of Noah Sevier, which contradicts this written agreement and bill of sale of said claim No. 15 offered in evidence by the defendant from Mining Records Book A, page 274, to show that the plaintiffs or their grantors "had full notice and knowledge of the claim of title by the said Stebbins and Hoffman and the defendant bank."

XV.

Strike out finding of fact number nineteen because there is no evidence to sustain it.

XVI.

Strike out finding of fact number twenty for the reason that the statement therein is not sustained by the testi mony in this: The amended certificate of location by the relocators of date January 29th, 1878, is signed by Edward Welch, Frank J. Sutherland, Hugh McCaffrey, and Henry Suessenbach. A relocation requires that all the acts of location are original with the relocators, and that the sworn application for patent made by Frank J. Sutherland, one of the relocators and applicants for patents, as appears by the exemplified copy of said application sworn to before Henry Rohleder, notary public, May 15th, 1878, offered in evidence by the defendant and received by the court over plaintiffs' objection, makes this statement of their right to enter said land for patent:

"Deponent further states that the fact- relative to the right to possession of himself and his co-claimants hereinbefore named to said mining claim, vein, lode, or deposit, and surface ground are substantially as follows, to wit, by purchase and relocation."

179 Also for the further reason that said finding is immaterial and incompetent in this:

1. Sevier, Durham, Moore, and Clifton had only a right of possession for mining purposes of placer claim 15, which they could transfer by writing or parole or could abandon or could forfeit, and they transferred and delivered this possession April 13, 1878, by writing to the two Sutherlands and Lake, and thus ended their occupancy of the claim.

2. Because Welch, Sutherland, McCaffrey, and Suessenbach based their right in their application to acquire the Government title on the fact of their right to possession of the claim sought to be patented both by purchase and relocation.

3. Because the patent is conclusive evidence that the patentees were rightfully entitled to it, and that no one else had any adverse interest in or to any part of said claim.

Conclusions of Law.

I.

Strike out conclusion of law number one for the following reasons:

1. Said conclusion is not responsive to any of the issues in the action.

2. Said conclusion is an erroneous statement of the law applicable to the case, wherein the court says: "And the title thereto was in the grantors, and such location amounted to a grant by the Government of the United States to the said Sevier, Durham, Moore, and Clifton of the exclusive right of possession thereof, together with the right to acquire the title from the Government, so long as they continued to comply with the laws of Congress and with the local laws, rules, and regulations governing such location." The title to said placer claim 15 was not in the locators when it was

180 a valid subsisting mining claim, but in the United States, and Sevier, Durham, Moore, and Clifton, or Sevier, Durham, Ham-

ilton, and Scott, at the time of the conveyances mentioned had no title in or to placer claim 15 or to any part thereof—only a right to the possession for mining; nor did they or any of them have the exclusive or any right to acquire the title from the Government, as it was not shown that they took any steps to that end by applying to the surveyor general of the United States for the Territory of Dakota to have said claim or some part of it officially surveyed and platted, without which no application for patent would be received in the U. S. land office.

3. Said conclusion is misleading and erroneous in the statement that "they had the power and authority to convey and assign such right of possession and the right to purchase and complete the title to the said Stebbins and Hoffman, and said Stebbins and Hoffman could transfer such right to this defendant, and by the conveyances set out in said findings the locators of said claim did transfer to said Stebbins and Hoffman and said Stebbins and Hoffman did transfer to the defendant such right of possession and the right to acquire from the Government the full title to the said disputed premises by patent, and the Government held such title in trust for said Sevier, Durham, Moore, and Clifton and their transferees," as such statement implies that the necessary steps to purchase had been taken by Sevier and his associates or by Stebbins and Hoffman or by the defendant bank of the ground in controversy, whereas there is not proof in the case, first, that the lot in controversy was at any time officially surveyed and platted by or under the directions of the surveyor general for either of the parties named; and, second, that an application was made by either of them at any time
181 to the land officers to be allowed to enter and purchase the same.

In addition, before a right of purchase of mineral land can exist so as to be the subject of transfer an application to purchase must be filed in the land office; a copy of the application must be posted in a conspicuous place on the claim, together with an official plat of the ground and proof made that they so remained posted for the full period of publication; that a notice of the application has been published by the receiver of the land office in a newspaper nearest the claim for the full period of sixty days; that work or improvements of not less than $500.00 in value has been done on the claim; that a copy of the location or relocation notice (either being sufficient) and a certified abstract of transfers from the register of deeds of the county shall be filed in the land office; an affidavit of citizenship of the applicant or that he has declared his intention to become such must also be filed. If all these things are regularly done and there is no adverse claim filed, then the applicant has a right to purchase the mining ground applied for and not before, and this right of purchase can be transferred; but in this case not one of all these preliminary steps was shown to have been taken by the defendant bank or any of its predecessors in interest in reference to the lot in dispute; and the further statement "that the Government held such title (the full title to said lot 2 A) in trust for said Sevier, Durham, Moore, and Clifton and their said

transferees" is an erroneous one and prejudicial to the rights of the plaintiffs.

II.

Strike out conclusion of law number two (2) for the following reasons:

1. Said conclusion is erroneous in its recitals that "F.
182 J. Sutherland, Lake, and J. J. Sutherland having agreed to make good the covenants and agreements of said Sevier, Durham, Moore, and Clifton, and said Sevier, Durham, Hamilton, and Scott, and to protect said Stebbins and Hoffman and their transferees in their possession and right to the possession of said premises as a part of the consideration for the purchase by them of said placer claim," as the record of the written contract of sale of April 13th, 1877 (Book A, page 274, mining records), offered in evidence by the defendant and received by the court over plaintiffs' objection, contains nothing to warrant such a recital, nor does the testimony of Noah Sevier which adds to and changes the terms of said written contract show that any agreement was made except an oral agreement between himself and Frank J. Sutherland to this tenor and effect: "I then told him that there was two lots on the claim (the Hoffman lot and lot A where the bank is) that we had given bed-rock title, or about the same as bed-rock title, as strong as we could make the title, and we felt bound to protect those, and if he agreed to protect those lots the same as we had agreed to I would make the sale, and he agreed to do it, and upon those terms the sale was made," which is all the testimony offered by the defendant on that point. The deeds of March 27th and 28th, 1877, had been delivered to Stebbins, and were not filed for record until April 24th, 1877, so that F. J. Sutherland was not chargeable with constructive notice of their contents before their filing for record, and there is no testimony whatever that he had any actual notice of the deeds mentioned; all there is is that Sevier and others "had given bed-rock title or about the same as bed-rock title" to the Hoffman lot and the lot A where the bank is, leaving the court to determine, if it can, what "bed-rock title" is and the mode of its conveyance.

183 2. Sevier's testimony shows that he agreed to make the sale of placer claim 15 to Frank J. Sutherland on the terms stated, and he (Frank J. Sutherland) agreed to do it. Not a word of testimony is there, outside of the written agreement of April 13th, 1877, of the terms on which Durham, Moore, and Clifton agreed to sell and of the conditions on which J. J. Sutherland and H. F. Lake agreed to buy, nor is any agency shown in Sevier to negotiate a sale for the interests of his co-owners who subsequently caused the terms of their agreement of sale to be reduced to writing and signed, in which Sevier joined.

3. It is in evidence and uncontradicted that J. J. Sutherland conducted and consum-ated the contract for the sale of placer claim 15 for himself, F. J. Sutherland, and H. F. Lake, and that the actual terms of the sale were in writing and signed by Sevier, Durham, Moore,

and Clifton, and that the instrument so signed was recorded, and that he paid the consideration for the purchase and knew nothing during the negotiations of any agreement to protect the title to the lot now occupied by the First National Bank of Deadwood.

4. Because the conclusion of law that "they, the said F. J. Sutherland, Lake, and J. J. Sutherland, were bound by said agreement (the oral agreement between Sevier and F. J. Sutherland testified to by Sevier), and so also were their grantees and those claiming under them, said grantees and all parties having full notice of said agreement and of the right under which said Stebbins and Hoffman and their transferees and this defendant held said premises. These arrangements and agreements between all the parties constituted an assignment of the contract to purchase which the location constituted between the Government and the locators, with an agreement on the part of the locators and their grantees to complete the purchase and perfect the title to said premises in dispute for
184 the benefit of said Stebbins and Hoffman and their assigns, including this defendant," is erroneous.

III.

Strike out conclusion of law number three (3) because the same is erroneous in this:

1. The Government is not a trustee of the title to any lands for any person until he first pays the purchase price of the land to its land officers authorized by law to receive it, and thus obtains the equitable title to it.

2. Sevier and his associates never purchased the Government title to the lot in question nor did the defendant bank or its grantors, and therefore had no equitable title to it against the Government which they could enforce.

3. Having no equitable title as against the Government, Suessenbach, McCaffrey, Sutherland, and the heirs of Edward Welch, deceased, took the legal title of placer claim 15, which includes this lot, by the patent issued to them, charged with no equities or conditions except those named therein.

4. When Stebbins and others filed their sworn protest against the application for patent on July 13, 1878, in the United States land office, he made no adverse claim to any part of the ground sought to be patented, but merely asked the land department "that a clause be inserted in the patent of said placer mining claim No. 15 above discovery, on Whitewood creek, excepting and excluding from said patent all town property rights upon the surface of said mining claim and all rights necessary or proper to the occupation, possession, and enjoyment of the same;" which protest was acted upon by the land department of the Government and said protest was determined by that department; and it was also determined that no town property rights could be acquired thereon, and this decision is final and cannot be reviewed by this court or ignored or set aside.

185 5. The failure by Stebbins to adverse said application for patent before the entry of said claim, July 16th, 1878, was a

waiver of any adverse rights he then had against the patentees, application for patent, and his quitclaim deed to the defendant of the lot in controversy, made in the latter part of August, 1878, gave it no rights that it can now assert against the title acquired from the Government.

IV.

Strike out conclusion of law number four (4), as the same is erroneous for the reasons given to conclusions one, two, and three.

V.

Strike out conclusion of law number five for the same reasons as given to conclusions one, two, and three.

VI.

Strike out conclusion number six, as the same is erroneous for similar reasons.

VII.

Strike out all the findings of fact and conclusions of law, because the court had no authority to make the same for the following reasons:

1. This was an action at law in which a jury was empanelled and sworn to well and truly try the issues in the case.

2. At the close of the testimony a motion was made by the defendant that upon the evidence presented and upon the pleadings a verdict be directed for the defendant; which motion was taken under advisement by the court and was not determined or continued by order of the court until the January term, 1887, was at an end.

3. That while said motion was pending in the January term, 1887, of this court the judge thereof on or about July 5th, 1887, made an order adjourning the term *sine die* and discharged the jury without making an order continuing the motion or the case itself, and it was therefore a mistrial.

4. That at the time of the making of the findings of fact and conclusions of law herein the court had no jurisdiction to make the same, as it had lost its authority over the action by a failure to continue the same from the January term, 1887, until the August term of the same year and by discharging the jury.

McLAUGHLIN & STEELE,
Att'ys for Plaintiffs.

186 Which motion to set aside and strike out came on for hearing before the court, at the court-house in Deadwood, in said Lawrence county, Dec. 13th, 1887, and was by the court overruled and denied, and to which ruling the plaintiffs, by their attorneys, at the time duly excepted this 13th Dec., 1887.

CHAS. M. THOMAS, *Judge.*

Service of notice and of the within motion acknowledged this 13th day of December, 1887.

MOODY & WASHABAUGH,
VAN CISE & WILSON,
Att'ys for Defendant.

In dist. court. Henry Suessenbach *et al. vs.* First National Bank of Deadwood. Mo. to set aside findings of fact, &c. Filed Jan'y 6, 1888. W. H. Jones, clerk, by Louis Caulfield, dep'y. McLaughlin & Steele, att'ys for pl'ffs.

187 TERRITORY OF DAKOTA, } *ss*:
County of Lawrence, }

In District Court, First Judicial District.

HENRY SUESSENBACH *et al.*, Plaintiffs,
vs.
FIRST NATIONAL BANK OF DEADWOOD, Defendant.

Motion to Vacate the Findings and Decision of the Court and for a New Trial.

Now comes the plaintiffs in the foregoing-entitled action, by their attorneys, and move the court to set aside and vacate its findings of fact, conclusions of law, and its decision made herein on October 6th, 1887, and filed on the following day, and grant a new trial for the following good and sufficient reasons, to wit:

First. Because the court erred in receiving in evidence on the part of the defendant against the objection of the plaintiffs the exemplified copy of the proceedings from the office of the Commissioner of the General Land Office, of date January 19th, 1884, under which the plaintiffs' patent was acquired.

Said document is incompetent, irrelevant, and immaterial under the issues in this action, in this—

1. The equitable defenses and counter-claims pleaded in the answer constitute no defense to the action, and any evidence except such as may tend to affect the amount of damages which the plaintiffs are entitled to recover is not responsive to the issues and is not competent or relevant.

2. The document offered is a copy of *ex parte* proceedings in the Land Department to obtain a patent from the United States
188 for a placer mineral claim, and the patent, having been regularly issued and offered and received in evidence by the court on the part of the plaintiffs, supersedes all the proceedings, and is conclusive of the title conveyed to the patentees named therein and of the regularity and legality of its issue, and it may not be explained, contradicted, varied, or altered in any particular by evidence in this court.

3. It appears from the document offered that on the 13th day of July, 1878, W. R. Stebbins, alleged to be the immediate grantor of the defendant and under whom it claims title to the lot in contro-

versy, with full knowledge of the patentees' application for patent, caused to be filed in the U. S. land office at Deadwood, Dakota, a sworn protest of himself and fifteen other persons, asking only "that a clause be inserted in the patent of said placer mining claim No. 15, above discovery on Whitewood creek, excepting and excluding from said patent all town property rights upon the surface of said mining claim and all rights necessary or proper to the occupation, possession, and enjoyment of the same," which protest was properly before and was acted upon by the land department and is not open to review in this court.

4. Said W. R. Stebbins made and filed no adverse claim to the patentees' application within the period of publication for the lot in controversy, and therefore waived the same, and the patent is conclusive upon the defendant.

5. No adverse claim can now be set up to said lot by the defendant, as its answer shows that it claims title to the same from W. R. Stebbins by deed made and delivered after said application for patent was allowed and entry made of placer claim No. 15 or mineral claim No. 86 in the Deadwood land office by the patentees named.

6. That the document offered shows that Henry Suessenbach, Hugh McCaffrey, Edward Welch, and Frank J. Sutherland
189 were purchasers of placer claim No. 15 above discovery, on Whitewood creek, from the grantees of Noah Sevier, Edward Durham, William Moore, and Thomas Clifton, the alleged locators thereof, and relocated the same by metes and bounds, courses and distances, on the 29th of January, 1878, in their own names, and on May 15th, 1878, made application for patent to the United States at the land office in Deadwood on the ground that they had the right of possession of the said claim "by purchase and relocation," and their application was duly allowed and they entered and paid for the same in said land office on the 16th day of July, 1878, and this proof does not sustain or tend to sustain any issue in the case.

7. The patentees took the title to said placer claim 15 from the United States charged with no conditions or equities except those named in the patent

8. The defendant had no equity to enforce against the Government for the lot in controversy and can assert none against its grantees.

Second. Because the court erred in receiving in evidence on the part of defendant against plaintiffs' objection the purported rules and regulations of the miners of the so-called Whitewood mining district contained in Book A of the so-called mining records of 1876 and purporting to have been adopted by miners April 6th, 1876.

Said rules and regulations are incompetent, immaterial, and irrelevant, in this:

1. They do not tend to sustain any issue in this case, as the defendant alleges in the paragraph number V in its "further amended answer" that on the 16th day of March, 1877, the certain real property of which the lot in controversy is a part was a part of the un-

appropriated public domain of the United States and was
190 valuable for minerals, and that on that day its predecessors in interest, Noah Sevier, Edward Durham, William Moore, and Thomas Clifton, located the same as placer claim No. 15 above discovery.

2. That the pretended rules and regulations offered in evidence purport to have been adopted by the miners of Whitewood mining district in April, 1876, and are therefore illegal and invalid because formed upon the Sioux Indian reservation, from which all white persons were excluded by law and to which locality the Indians alone had the right of possession until February 28th, 1877, and no rights could flow from such illegal acts to the alleged locators of March 16th, 1877.

Third. Because the court erred in admitting in evidence on the part of the defendant and against plaintiffs' objection the pretended record in Book A of Whitewood mining district, identified by the witness Hildebrand, on page 216, of what purports to be a relocation on record of placer claim No. 15 above discovery, on Whitewood creek, as the same is incompetent, immaterial, and irrelevant, in this:

1. There is no proof that the miners of Whitewood mining district, after February 28th, 1877, and before the alleged location of placer claim number 15, on the 16th day of March, 1877, adopted any rules or regulations requiring a record of a mining location to be made in a district record, and therefore no such record was required.

2. The purported record is a nullity, as it recites that the location was made according to the local mining laws of the district, and no such laws are proven; it does not declare or state or recite that the location was made in accordance with the laws of the United States and of the Territory of Dakota, as alleged in the "further amended answer" of defendant.

191 3. The moners gave no effect by rule or regulation to a record of a location in the mining district, and the proof offered is irrelevant.

4. The proof offered tends to sustain no issue in the action; and, besides, if the grantor of defendant and its predecessors in interest could connect themselves with the alleged relocation of placer claim 15 above discovery, on Whitewood creek, by Noah Sevier, Edward Durham, William Moore, and Thomas Clifton, on March 16th, 1877, the failure of said grantors to adverse the application of the patentees for a patent to said claim was a waiver of all his alleged interest therein and the defendant acquired no interest in the lot in controversy.

5. According to the defendant's own proof the claim was relocated on January 29th, 1878, by the patentees, so that all previous locations of the same mining ground went for naught and the right to the possession of the same dated from that time, and the patent only relates to that time.

Fourth. Because the court erred in admitting the purported record in Book A testified to by the witness Hildebrand in evidence on the part of the defendant, against objection from the plaintiffs, to prove

the custom of the placer miners and mining claimants in Whitewood mining district to record their certificates of location and notices, as the same is incompetent, immaterial, and irrelevant, in this:

1. Proof of the existence of a custom or usage at any place in this Territory must be established by showing that "it was known to the parties affected thereby, or so well established, general, and uniform that they must be presumed to have acted with reference thereto."

2. The record offered did not show the custom of the miners to record at the date of the alleged location, March 16th,
192 1877, or of the date of record in mining district records nor at any other time. It did not prove itself.

3. The proposed proof did not tend to sustain any issue in the case.

Fifth. Because the court erred in admitting in evidence against the plaintiffs' objection the Book A, purporting to be the mining records of Whitewood mining district, to identify Frank Sutherland's signature to the relocation record of placer claim 15 above discovery, on Whitewood, as the same is incompetent and irrelevant, in this:

1. There is nothing to show that the keeping of such a record was authorized by the rules and customs of the miners when it was lawful for them to have such a record.

2. There is nothing to show that a deputy recorder was authorized to make and sign such records in his own name.

3. The witness testified that the mining recorder at the time this record purports to have been made was J. J. Sutherland.

Sixth. Because the court erred in admitting in evidence on the part of the defendant and against the objection of the plaintiffs the record of the written conveyance, on page 257, Book A, mining record, of placer mining claim number 15 above discovery, on Whitewood creek, purporting to have been made April 13th, 1877, by Noah Sevier, Edward Durham, William Moore, and Thomas Clifton to F. J. Sutherland, H. F. Lake, and J. J. Sutherland, as the same is incompetent and irrelevant, in this:

1. It does not tend to sustain any issue in this case.

2. The original conveyance, being in writing, is the best testimony, and the absence of the original is not accounted for.

3. The record offered is not required to be kept nor authorized.

193 4. The transaction mentioned in the record offered was prior to the issue of the patent, and all questions to the right to the possession of each and every part of said placer claim 15 by defendant or any other person or persons was concluded by its issue to the patentees, and it took effect by relation as of the date of the entry at the land office in Deadwood, July 16th, 1878.

Seventh. Because the court erred in admitting in evidence on the part of the defendant against the objection of plaintiffs the testimony of Noah Sevier regarding the location and relocation of placer claim number 15 above discovery, on Whitewood creek, by himself, Edward Durham, William Moore, and Thomas Clifton on March 16th, 1877, and the purported record of the same in Book A by Frank Sutherland, and of the understanding with other placer mine

claimants to lay off their claims into town lots, as the same is incompetent, irrelevant, and immaterial, in this:

1. The only interest that he and his colocators had in said claim after a location thereof was an exclusive right to the possession for the purposes of mining so long thereafter as they complied with the mining laws of the United States and of the Territory of Dakota and with the rules, regulations, and usages of the miners in said Whitewood mining district, if there was any, and it has been shown by the defendant that Sevier and his colocators parted with and transferred their right to the possession of said claim to the Sutherlands and Lake April 13th, 1877.

2. That from March 16, 1877, until they sold out—a period of only 28 days—Sevier, Durham, Moore, and Clifton did not and could not acquire title to said placer claim or any interest in the soil thereof that was necessarily the subject of alienation by
194 deed and that could burthen the United States title or impair its rights to the primary disposal of the soil to those who duly applied under the law and the rules and regulations of the Land Department to enter and purchase the same.

3. The same is not responsive to any issue in the action.

4. Sevier, Durham, Moore, and Clifton are not shown to have taken any steps to acquire the patent title to the lot in controversy nor is it shown that Stebbins and Hoffman or the defendant did so or were prevented from doing so by any improper act of the plaintiffs or any of their grantors.

5. The oral testimony of Sevier contradicts, alters, and varies the written conveyance made by him and his colocators on April 13, 1877, of placer claim No. 15 to the two Sutherlands and Lake, and is therefore inadmissible under the rule of evidence in such cases in this Territory.

Eighth. Because the court erred in admitting in evidence on the part of the defendant against plaintiffs' objection the deed from Sevier, Durham, Moore, and Clifton of lot 2 A, in Deadwood, to Stebbins and Hoffman, of date March 28th, 1877, and the deed of the same lot by Sevier, Durham, Hamilton, and Scott to the same parties on March 27th, 1877, as the same are incompetent, irrelevant, and immaterial, in this:

1. The deed of March 28th, 1877, is a quitclaim and conveys no interest except such as the grantors Sevier and Durham possessed in the premises named.

2. Sevier and Durham had already sold their interest in said premises by deed of March 27th, 1877.

3. The deed of Sevier, Durham, Hamilton, and Scott was also a mere quitclaim, with certain personal covenants binding on them.

4. The grantees in said deed took the same with full knowledge that the title to the premises was in the Government;
195 that the premises were mineral land, and that the only right of the grantors thereto by location was a right of possession and to mine for and appropriate the valuable minerals therein, and this right only could be transferred by them to the grantees whether

made orally or in writing, and that Moore and Clifton's right of joint occupancy still continued.

5. Sevier undertakes, in violation of the statute of frauds, to show an agreement for an interest in land not in writing between Durham and himself on the one hand and Hamilton and Scott on the other in relation to the lot in controversy, and proves that the latter had no interest in it.

6. The patent supercedes and renders nugatory all proof of such matters occurring anterior to its issue.

Ninth. Because the court erred in admitting in evidence on the part of the defendant against the objection of plaintiffs the oral testimony of the witness Sevier about negotiations with Frank J. Sutherland that preceded the written contract of sale of placer claim No. 15 to the Sutherlands and Lake, and which alter and vary its terms, as the same is incompetent and immaterial, in this:

1. The written contract of sale of April 13, 1877, supercedes all negotiations and stipulations concerning its matter which preceded or accompanied its execution.

2. The testimony of Sevier is contradicted by the written contract and by the testimony of J. J. Sutherland as to the actual negotiations on which the sale was made, and the court must have disregarded both the written contract of sale and the testimony of J. J. Sutherland in its findings of fact and conclusions of law.

3. Sevier's testimony tended to sustain no issue in the case nor any equity in the defendant as against the United States or the plaintiffs.

196 4. Sevier's testimony attempts to establish an agreement, not in writing, for an interest in land between himself and Frank Sutherland inuring to the benefit of the defendant, which is contrary to the statute and void.

Tenth. Because the court erred in admitting in evidence the depositions of S. N. Wood and W. R. Stebbins against the objections of plaintiffs, as the same are incompetent, irrelevant, and immaterial under the issues in this action in this:

1. All matters relating to any adverse claim to any part of mineral claim number 15 above discovery, on Whitewood, by Hoffman and Stebbins or by Hoffman or Stebbins, were waived by the failure to adverse the application of Suessenbach, McCaffrey, *et al.* to enter and purchase the same.

2. The patent issued concludes all inquiry into the anterior steps of those who, claiming an adverse interest, *who* failed to assert the same within the time and in the manner prescribed by the mining laws of Congress.

Eleventh. Because the court erred in receiving in evidence on the part of the defendant against objection from plaintiffs the quitclaim deed of the lot in controversy from W. R. Stebbins to the First National Bank of Deadwood, dated August 10th, 1878, and acknowledged in Arapahoe county, State of Colorado, on the 21th day of August, 1878, and filed for record in the register of deeds' office, Lawrence county, D. T., August 31, 1878, as the same is incompetent, irrelevant, and immaterial in this:

1. It is shown that W. R. Stebbins was a witness to the written conveyance and transfer of the right of possession to placer claim No. 15 above discovery, on Whitewood, of date April 13, 1877, by Noah Sevier, Edward Durham, William Moore, and Thomas
197 Clifton to Frank T. Sutherland, H. F. Lake, and J. J. Sutherland, and had actual notice of the application of Henry Suessenbach and his co-applicants for a patent for said claim.

2. The defendant accepted from said W. R. Stebbins a quitclaim deed for the lot in controversy and cannot therefore be regarded as a *bona fide* purchaser without notice.

3. The terms of the quitclaim deed to the defendant *was* notice to it that Stebbins waived all interest in the ground adverse to the applicants for patent more than a month before it accepted the deed, and it took nothing under the deed, as he had nothing to convey in said placer claim.

4. The primary disposal of the soil of placer claim number 15 above discovery, on Whitewood creek, by the United States to Suessenbach and his co-applicants, on July 16th, 1878, could in no manner be affected by said quitclaim deed, nor could it have the effect of charging the patent issued with an equity.

Twelfth. Because the court erred in admitting in evidence on the part of the defendant against objection by the plaintiffs testimony of Donald A. McPherson and the witnesses as to the separate value of the lot in controversy, aside from the improvements thereon, and the separate value of the improvements, as the same is incompetent, irrelevant, and immaterial in this:

1. No person can recover for betterments placed upon the mineral lands of the United States which are afterwards conveyed by them to a patentee.

2. It is not within its grant of legislative power for the legislative assembly of Dakota to pass any law that will burthen or restrict the United States in its primary disposal of any of its lands or affect its title in the hands of its patentees.

198 Thirteenth. Because the court erred in making its finding of fact number one (1) and in refusing to strike out the same at plaintiffs' request, as the same is incompetent, irrelevant, and immaterial for the reasons given in the motion to set aside and strike out certain findings of fact and conclusions of law made herein by the plaintiffs.

Fourteenth. Because the court erred in making finding of fact number two (2) and in refusing to strike out the same as requested by plaintiffs in their motion to set — and strike out for the reason given in said motion.

Fifteenth. Because the court erred in making finding of fact number three (3) and in refusing to strike out the same as requested by plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Sixteenth. Because the court erred in making finding of fact number four (4) and in refusing to strike out the same as requested by plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Seventeenth. Because the court erred in making finding of fact number five (5) and in refusing to strike out the same as requested by plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Eighteenth. Because the court erred in making finding of fact number six (6) and in refusing to strike out the same as requested by plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Nineteenth. Because the court erred in making finding of fact number seven (7) and in refusing to strike out the same as re-
199 quested by plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Twentieth. Because the court erred in making finding of fact number eight (8) and in refusing to strike out the same as requested by the plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Twenty-first. Because the court erred in making finding of fact number nine (9) and in refusing to strike out the same as requested by plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Twenty-second. Because the court erred in making finding of fact number ten (10) and in refusing to strike out the same as requested by plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Twenty-third. Because the court erred in making finding of fact number eleven (11) and in refusing to strike out the same as requested by plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Twenty-fourth. Because the court erred in making finding of fact number twelve (12) and in refusing to strike out the same as requested by plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Twenty-fifth. Because the court erred in making finding of fact number seventeen (17) and in refusing to strike out the same as requested by plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Twenty-sixth. Because the court erred in making finding of fact number eighteen (18) and in refusing to strike out the same as requested by plaintiffs in their motion to set aside
200 and strike out for the reasons given in said motion.

Twenty-seventh. Because the court erred in making finding of fact number nineteen (19) and in refusing to strike out the same as requested by plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Twenty-eighth. Because the court erred in making finding of fact number twenty (20) and in refusing to strike out the same as requested by plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Twenty-ninth. Because the court erred in its first conclusion of law and in refusing to strike out the same as requested by plaintiffs

in their motion to set aside and strike out for the reasons given in said motion.

Thirtieth. Because the court erred in its second (2) conclusion of law and in refusing to strike out the same as requested by plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Thirty-first. Because the court erred in its third (3) conclusion of law and in refusing to strike out the same as requested by plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Thirty-second. Because the court erred in its fourth (4) conclusion of law and in refusing to strike out the same as requested by plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Thirty-third. Because the court erred in its fifth (5) conclusion of law and in refusing to strike out the same as requested by
201 plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Thirty-fourth. Because the court erred in its sixth (6) conclusion of law and in refusing to strike out the same as requested by plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Thirty-fifth. Because the court erred in all its findings of fact and conclusions of law and in refusing to strike out the same as requested by plaintiffs in their motion to set aside and strike out for the reasons given in said motion.

Thirty-sixth. Because the findings of fact and each of them are not sustained by sufficient evidence and the conclusions of law and each of them and the decision of the court are against law.

Deadwood, D. T., Dec. 14, 1887.

McLAUGHLIN AND STEELE,
Att'ys for Plaintiffs.

202 To said defendant and to Moody & Washabaugh and Van Cise & Wilson, its att'ys:

Take notice that on Thursday, the 22d day of December, A. D. 1887, at 10 o'clock a. m. or so soon thereafter as the matter can be heard, we will, at the court-house in Deadwood, in said county, call up the foregoing motion to vacate and set aside the findings of fact and conclusions of law and grant a new trial for the action of the court thereon. A copy of said motion is herewith served upon you. The motion will be made upon a bill of exceptions.

McLAUGHLIN & STEELE,
Att'ys for Plaintiffs.

Deadwood, D. T., December 22, 1887.

Service of a copy of the within motion and notice on us admitted this 14th day of December, 1887.

MOODY & WASHABAUGH,
VAN CISE AND WILSON,
Att'ys for Def't.

In district court, first judicial district, Lawrence county, Dakota Territory. Henry Suessenbach *et al. vs.* First National Bank of Deadwood. Motion to vacate the findings and decisions of the court and for a new trial. Filed Jan'y 6th, 1888. W. H. Jones, clerk. McLaughlin & Steele, att'ys for plaintiffs.

202*a* TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

In District Court, First Judicial District.

HENRY SUESSENBACH *et al.*, Plaintiffs,
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, DAKOTA, Defendant.

To said defendant and Messrs. Van Cise & Wilson and Moody & Washabaugh, its attorney-:

Take notice that on the 15 day of December, A. D. 1887, at ten o'clock a. m., at the court-house in Deadwood, D. T., we will apply to the court or the judge thereof to settle, allow, and sign the foregoing bill of exceptions, a copy of which is herewith served upon you, and to order the same made a part of the record in this case.

McLAUGHLIN & STEELE,
Attorneys for Plaintiff-.

Dec. 9, 1887.

Service of the foregoing notice and proposed bill of exceptions accompanying admitted this 9th day of December, 1887, at Deadwood, in Lawrence county, Dakota.

G. C. MOODY,
Att'y for Defendant.

(Endorsed:) In district court. Henry Suessenbach *et al. vs.* First National Bank of Deadwood. Bill of exceptions. Served on G. C. Moody, att'y for defendant, Dec. 9, 1887. Filed April 28, 1888. W. H. Jones, clerk.

202*b* TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

I, Charles M. Thomas, associate justice of the supreme court of Dakota Territory and presiding judge of the first judicial district court of said Territory in and for said Lawrence county, and who presided at the trial of the foregoing-entitled action, do hereby certify that the foregoing bill of exceptions was presented to me on this 28th day of April, A. D. 1888.

And now, inasmuch as the matters aforesaid are not of record and the foregoing bill of exceptions contains the evidence and all the evidence in the case offered by either party on the trial and the rulings of the court thereon and *and* exceptions thereto, and the plaintiffs having within the time allowed by the court prayed the court to settle, allow, and sign this their bill of exceptions and order

the same made a part of the record, it is accordingly so done, and the clerk is hereby directed to file the same as a part of the record in this case.

CHAS. M. THOMAS,
Associate Justice of the Supreme Court of the Territory of Dakota and Presiding Judge of the First Judicial District.

203 TERRITORY OF DAKOTA, } ss:
First Judicial District, }

In the District Court in and for the County of Lawrence.

HENRY SUESSENBACH *et al.*, Plaintiffs,
vs.
FIRST NATIONAL BANK OF DEADWOOD, Defendant.
Ruling on Motion for a New Trial.

On this 28th day of April, 1888, the motion for a new trial heretofore served and filed in this case came on for hearing before the court, and after hearing the argument of counsel for plaintiffs and defendant thereon, and the court being fully advised in the premises, it is

Ordered that the same be, and is hereby, denied and overruled.

To which order the plaintiffs at the time, by their counsel, excepted.

CHAS. M. THOMAS, *Judge.*

Dated Deadwood, D. T., April 28th, 1888.

204 TERRITORY OF DAKOTA, } ss:
First Judicial District, }

In the District Court in and for Lawrence County.

At a regular term of the district court within and for the county of Lawrence, in the first judicial district of Dakota Territory, held at the court-house, in the city of Deadwood, in said county, on the 28th day of April, 1888.

Present: The Hon. Charles M. Thomas, judge of said court, and the officers thereof.

HENRY SUESSENBACH, HUGH MCCAFFREY, DANIEL MCLAUGHLIN, and WILLIAM R. STEELE, Plaintiffs,
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, Defendant.

Now come the above-named parties, plaintiffs and defendant, by their attorney-, and this cause heretofore come- on for trial in this court upon the issues herein, and the court having heard the proofs adduced under the defendant's counter-claim and equitable defences, and the court having, on the 7th day of October, 1887, made and filed in this court his decision, consisting of the findings of fact and conclusions of law, by which he finds and renders his decision

for the defendant and finds and decides that the plaintiffs are not entitled to recover in this action, and that a decree should be entered for defendant dismissing the complaint on the merits, enjoining the plaintiffs from further prosecuting or maintaining this action for the recovery of possession of the lot or premises described in plaintiff's complaint, or from making any claim thereto under the title alleged in said complaint and should convey the said lot and premises to the defendant—

205 Now, therefore, upon motion of Edwin Van Cise and G. C. Moody, of defendant's attorneys, it is—

Considered, ordered, adjudged, and decreed that said plaintiffs take nothing by this action; that the plaintiffs' complaint be, and the same is hereby, dismissed on the merits of the action.

It is further considered, ordered, adjudged, and decreed that the said plaintiffs now hold the legal title to the disputed premises described in plaintiffs' complaint as that certain piece or parcel of land situate, lying, and being on Main street, in the city of Deadwood, county of Lawrence, and Territory of Dakota, and more particularly described as follows, to wit: Commencing at the northeast corner of Main and Lee streets, thence running in a northeasterly direction along the line of said Main street 21.5 feet; thence at right angles to said Main street in a northwesterly direction 100 feet; thence in a southwesterly direction parallel with said Main street 21.5 feet; thence in a southeasterly direction at right angles to said Main street 100 feet to place of beginning, being lot No. 2, in block No. 3, and a part of mineral claim No. 86, as patented by the United States, and otherwise described as lot No. 2 A, on Main street, in the town site of Deadwood, in trust for defendant.

It is further considered, ordered, adjudged, and decreed that said plaintiffs and all those claiming under them or either of them since the commencement of this action be, and they are hereby, enjoined and restrained from further prosecuting or maintaining this action or any action for the recovery of the possession of said lot or premises thus described in said complaint or from making any claim thereto under the title alleged in said complaint.

206 It is further considered, ordered, adjudged, and decreed that upon payment or tender of the defendant's proportionate share of the expenses of making the entry and obtaining the patent to said mineral lot No. 86 from the United States that said plaintiffs convey said property to the defendant and make, execute, and deliver to said defendant a proper deed of conveyance of the said lot and land thus described in plaintiffs' complaint and otherwise described as lot No. 2 A, in Deadwood, which proportionate share of such expenses, if not agreed upon between the parties, may be ascertained by plaintiffs making application to this court, and if the plaintiffs fail to produce proof of such costs and expenses within ten days from the entry of this judgment that they make such deed without such tender or payment.

It is further considered, ordered, adjudged, and decreed that if the said plaintiffs shall fail to make such deed for a period of thirty days after the entry of this judgment that then the clerk of this

court be, and he is hereby, appointed a commissioner to make such deed for said property thus described in said plaintiffs' complaint, in the name of said plaintiffs, to the said defendant, and upon deposit with the said clerk by defendant for the use of said plaintiffs of the amount thus agreed upon or ascertained to be the proportionate share which said premises should bear of the expenses of making such entry and procuring the patent, of if the plaintiffs shall decline for the period aforesaid to furnish proof of such costs and expenses that said commissioner deliver to said defendant such deed of conveyance, which shall convey to the said defendant all the title which said plaintiffs had in and to said premises at the commencement of this action or at any time since.

207 It is further ordered and adjudged that said defendant have and recover of said plaintiffs its costs and disbursements in and about this suit expended, amounting to the sum of twenty dollars — cents.

Done in open court this 28th day of April, 1888.

By the court:

CHAS. M. THOMAS, *Judge*.

To which judgment and decree of the court the plaintiffs at the time duly excepted and prayed that their exception be made a part of the record, which was so done accordingly.

By the court:

CHAS. M. THOMAS, *Judge*.

April 28th, 1888.

The costs are agreed to at twenty dollars.

McLAUGHLIN & STEELE,
Att'ys for Plaintiffs.

Territory of Dakota, Lawrence county. Henry Suessenbach *et al.* *vs.* First Nat'l Bank of Deadwood. Judgment. Filed April 28th, 1888. W. H. Jones, clerk.

208 & 209 TERRITORY OF DAKOTA, } *ss.*:
First Judicial District, }

In the District Court in and for the County of Lawrence.

HENRY SUESSENBACH, HUGH McCAFFREY, Daniel McLaughlin, and William R. Steele, Pl'ffs and Appellants, *against* THE FIRST NATIONAL BANK OF DEADWOOD, Def't and Respondent.	Notice of Appeal from Judgment.

Please to take notice that the plaintiffs, Henry Suessenbach *et al.*, in the above-entitled action appeal from a judgment entered therein on the 28th day of April, 1888, in favor of the defendant and against the plaintiffs for a deed of conveyance from the plaintiffs to the defendant of lot 2, in block 3, in Deadwood, in said county, and

from the whole of said judgment to the supreme court of the Territory.

Yours, &c., McLAUGHLIN & STEELE,
Attorneys for Plaintiffs.

To Van Cise & Wilson and Moody & Washabaugh, attorneys for defendant, and W. H. Jones, clerk of the district court of the county of Lawrence.

(Endorsed:) Territory of Dakota. In district court, Lawrence county. Henry Suessenbach *et al. vs.* First National Bank of Deadwood, Dakota. Notice of appeal from judgment. Due service by copy of the within admitted this 30th day of April, 1888. Moody & Washabaugh, Van Cise & Wilson, attorneys for def't. W. H. Jones, clerk of court. Filed April 30th, 1888. W. H. Jones, clerk.

210 TERRITORY OF DAKOTA, } *ss.*
First Judicial District, }

In the District Court within and for Lawrence County.

HENRY SUESSENBACH, HUGH McCAFFREY, DANIEL McLAUGHLIN, and WILLIAM R. STEELE, Plaintiffs & Appellants,
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, Defendant & Respondent.

Whereas on the 28th day of April, 1888, in the district court within and for the county of Lawrence, the above-named respondent recovered a judgment against the above-named appellants for the execution of a deed of conveyance by appellants to the respondent of lot 2, in block 3, in the city of Deadwood, in Lawrence county, Dakota Territory;

And the above-named appellants, feeling aggrieved hereby, intend to appeal therefrom to the supreme court of the Territory of Dakota:

Now, therefore, we do hereby undertake that the said appellants will pay all costs and damages which may be awarded against them on said appeal or on a dismissal thereof not exceeding two hundred and fifty dollars, and do also undertake that if the said judgment so appealed from or in any part thereof be affirmed or said appeal be dismissed the said appellant- will pay the amount directed to be paid by the said judgment or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against said appellants on said appeal.

Dated April 30th, 1888.

W. E. LOWE.
J. F. IRWIN.

211 TERRITORY OF DAKOTA, } *ss.*
Lawrence County, }

On this 30th day of April, A. D. 1888, before me, the subscriber, appeared W. E. Lowe and Joseph F. Irwin, to me personally known

to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

In witness whereof I have hereunto set my hand and official seal the day and year above written.

[NOTARIAL SEAL.] WILLIAM L. McLAUGHLIN,
Notary Public.

TERRITORY OF DAKOTA, } ss:
Lawrence County, }

W. E. Lowe and Joseph F. Irwin, being severally sworn, each for himself says: The said W. E. Lowe says he is a resident and householder of the county of Lawrence, in this Territory, and that he is worth the sum of $500.00 over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution; and the said Joseph Irwin for himself says that he is a resident and householder of the county of Lawrence, in this Territory, and that he is worth the sum of $500.00 over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution.

JOSEPH F. IRWIN.
W. E. LOWE.

Subscribed and sworn to before me this 30th day of April, 1888.
[NOTARIAL SEAL.] WILLIAM L. McLAUGHLIN,
Notary Public.

(Endorsed:) Territory of Dakota, county of Lawrence. In district court. Henry Suessenbach, Hugh McCaffrey, Daniel Mc-
212 Laughlin, & William R. Steele *vs.* First National Bank of Deadwood, Dakota. Undertaking on appeal to supreme court. Due service by copy of the within admitted this 30th day of April, 1888. Moody & Washabaugh, Van Cise and Wilson, attorneys for def't. W. H. Jones, clerk of court. Filed April 30th, 1888. W. H. Jones, clerk.

213 In District Court, First Judicial District of Dakota Territory, in and for Lawrence County.

HENRY SUESSENBACH, HUGH MCCAFFREY, Daniel McLaughlin, and William R. Steele, Pl'ffs,
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, Def't.
} Amended Answer.

The defendant, by way of amended answer to the complaint—

1. Denies each and every allegation in said complaint contained except as hereinafter admitted.

2. Admits it is in possession of the real property and premises described in the complaint.

3. Further answering said complaint, that on the 8th day of May, 1878, the plaintiffs Daniel McLaughlin and William R. Steele were not owners nor seized in fee of the real property described in the complaint, nor did they have any right, title, interest, or estate therein; and upon information and belief that the said Daniel McLaughlin and William R. Steele did not gain or acquire their pretended title thereto until on or about the 10th day of August, 1882, when a deed was executed to them by Henry Suessenbach and Hugh McCaffrey, purporting to convey them an undivided one-fourth interest in and to the real property described in the complaint as in possession of defendant, with other property; but at the date of the execution and delivery of such deed the defendant was in the actual possession of the said real property described in plaintiffs' complaint and each and every part thereof, claiming under a title adverse to that of said Henry Suessenbach and Hugh McCaffrey, to wit, under a title derived through regular series of conveyances from Noah Siever, Edward Durham, William Moore,
214 and Thomas Clifton, the owners of the real property aforesaid; and defendant alleges that by reason of such actual possession of defendant at the date aforesaid, claiming title adversely to that of said plaintiffs' grantors, Henry Suessenbach and Hugh McCaffrey, said grant and deed of conveyance so made and delivered by said Henry Suessenbach and Hugh McCaffrey to said Daniel McLaughlin and William R. Steele was and is void, and the said Daniel McLaughlin and William R. Steele have no right to bring or maintain this action.

4. Further answering said complaint, that on the 8th day of May, 1878, the plaintiffs Henry Suessenbach and Hugh McCaffrey were not the owners nor seized in fee of the real property described in the complaint, nor did they have any right, title, interest, or estate therein. Upon information and belief that prior to that time, to wit, on or about January 5th, 1878, the plaintiffs Henry Suessenbach and Hugh McCaffrey obtained a pretended grant or deed of conveyance from one H. F. Lake for an undivided one-third interest in real property purporting to include that described in the complaint, but that at the time of the execution and delivery of such grant and deed C. Hoffman and William R. Stebbins, grantors of this defendant, were in the actual possession of the said real property described in the complaint and every part thereof, claiming under a title adverse to that of H. F. Lake, to wit, under a title derived from Noah Siever, Edward Durham, William Moore, and Thomas Clifton, owners of the real property aforesaid. Upon information and belief that on or about July 6th, 1878, the plaintiff Hugh McCaffrey obtained a pretended grant or deed of conveyance from one F. T. Sutherland for an undivided one-third interest in said real property, but that at the time of the execution and delivery of such grant and deed said C. Hoffman and W. R. Stebbins, grantors of this defendant, were
215 in the actual possession of said real property and every part thereof, claiming under a title adverse to that of said Sutherland, to wit, under a title derived from Noah Siever and others as aforesaid. Upon information and belief that said plaintiff, Henry

Suessenbach, claims some further title in said real property by virtue of a pretended grant or deed from Frank Welch and others, heirs-at-law of Edward Welch, deceased, of date August 5th, 1882, and purporting to convey to said plaintiff an undivided one-third interest therein; but that at the date of the execution and delivery of such grant and deed this defendant was in the actual possession of said real property and every part thereof, claiming under a title adverse to that of said Frank Welch and others, heirs of Edward Welch, deceased, to wit, under a title derived through a regular series of conveyances from Noah Siever, Edward Durham, William Moore, and Thomas Clifton, the owners of the real property aforesaid; and defendant alleges that the said several pretended grants constitute the title under which plaintiffs claim, but that by reason of such actual possession of defendant's grantors at the dates aforesaid and the actual possession of defendant at the date last aforesaid, claiming adversely as aforesaid to said plaintiffs' grantors, the said several grants and deeds of conveyance so made and delivered to said plaintiffs, Henry Suessenbach and Hugh McCaffrey, were and are void and said plaintiffs have no right to bring or maintain this action.

5. Further answering said complaint, upon information and belief that on the 16th day of March, 1877, the real property hereinafter described was a part of the unappropriated public domain of the United States and a part and portion of the lands valuable for minerals and containing valuable mineral deposits, and there-
216 upon Noah Siever, Edward Durham, William Moore, and Thomas Clifton, being citizens of the United States, entered upon and explored the same and duly occupied, located, and appropriated the same as placer mining ground (the same being valuable as placers) by a due and proper compliance with the laws of the United States and of the Territory of Dakota and in accordance with the local customs and rules of miners in the Whitewood mining district; that the land so located and appropriated by said Noah Siever and his associates was known and described as placer claim No. 15 above discovery, on Whitewood gulch, in Whitewood mining district, Lawrence county, Dakota Territory, and that thereupon by virtue of the said location and appropriation the said Noah Siever and his associates aforesaid became the owners of said land and entitled to the possession thereof, and that thereafter they continued the owners in possession thereof, complying with all the laws, rules, regulations, and customs aforesaid and thereby entitled to keep and maintain their possession; that, being so the owners in possession and entitled to the possession thereof, Noah Siever, Edward Durham, William Moore, and Thomas Clifton on or about the 28th day of March, 1877, granted and conveyed by a proper instrument purporting to grant the same in fee simple that portion of placer claim No. 15 aforesaid described as lot No. 2 A, on the corner of Lee and Main streets, Deadwood (being the same property described in the complaint), to C. Hoffman and W. R. Stebbins; and thereafter, to wit, on or about the 20th day of April, 1877, said Noah Siever and Edward Durham having segregated from their as-

sociates aforesaid their interest in said placer claim No. 15 and became the owners of the south half thereof, which includes the property in controversy, and admitted to some interest therein
217 James A. Hamilton and H. J. Scott, the said Siever, Durham, Hamilton, and Scott executed and delivered a further deed of conveyance granting and conveying in fee simple the property above described, with full covenants of title, to the said C. Hoffman and W. R. Stebbins, from whom by a regular series of conveyances the title to said property has come to this defendant; that the title of plaintiffs purports to be based on a purchase made by their grantors from the aforesaid owners of placer claim No. 15, Noah Siever, Edward Durham, William Moore, and Thomas Clifton, on or about June 26, 1877, but that the same was made with full notice and knowledge of the title then standing in defendant's grantors as aforesaid and while they were in actual possession claiming adversely thereunder.

And by way of counter-claim against said plaintiffs this defendant alleges—

1. That on the 28th day of February, 1877, the land hereinafter described was a part of the unappropriated public domain of the United States and was land valuable for minerals and containing valuable mineral deposits, and, upon information and belief, that on that day Noah Siever, Edward Durham, William Moore, and Thomas Clifton, being citizens of the United States, entered upon and explored the same, and on or about March 16th, 1877, duly located, claimed, and appropriated the same as placer mining ground (the same being valuable as placers) by due compliance with the laws of the United States and the Territory of Dakota and with the local customs and rules of miners in the Whitewood mining district; that the land so located, claimed, and appropriated by said Noah Siever, Edward Durham, William Moore, and Thomas Clifton was known and described as placer claim No. 15 above discovery, on Whitewood gulch, in Whitewood mining district, Lawrence
218 county, D. T., and thereupon, by such location and appropriation, said Noah Siever and his associates became the owners thereof, and thereafter continued in the possession thereof, mining and extracting gold therefrom and complying with all the laws, rules, regulations, and customs aforesaid.

2. Upon information and belief that thereafter, to wit, on or about March 17th, 1877, the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, being the owners and in possession of the land described as placer claim No. 15 as aforesaid, taking with them sundry other persons to defendant unknown, owners of adjoining placer claims described as Nos. 13 and 14 above discovery on Whitewood gulch, located and laid out a town upon the same, to wit, on placer claims Nos. 13, 14, and 15 aforesaid, to wit, the town of Deadwood, subdivided the same into lots and blocks and marking and dedicating certain parts as streets and alleys and platting and recording the same, but it was then and there agreed and understood, however, that the owners of each placer claim as aforesaid continued the owners thereof and of that portion of the town

thus created which was coextensive with the boundaries of their claim, to wit, that Noah Siever, Edward Durham, William Moore, and Thomas Clifton continued the owners of placer claim No. 15 and of that part of the town site thus created situate thereon, and they did so continue owners thereof and remained in possession thereof and thereafter sold lots and parts of said town site covering said placer claim No. 15, designating and describing the same by the numbers and descriptions adopted in creating the saod town site and made deeds therefor and put sundry parties in possession thereof, who thereupon made valuable improvements thereon and in divers ways occupied and used the same for purposes of trade, business, and residence.

219 3. Upon information and belief that thereafter, to wit, on March 28th, 1877, the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, being then the owners of that portion of placer claim No. 15 and of the town site of Deadwood described as lot No. 2 A on Main street, for a good and valuable consideration sold and by a proper instrument purported to grant in fee simple the said lot No. 2 A to C. Hoffman and W. R. Stebbins, and they became the owners thereof; that said deed was duly filed for record in the office of the register of deeds of Lawrence county on the 25th day of April, 1877, and recorded in Book A, on page 77.

4. Upon information and belief that thereafter the said Noah Siever and Edward Durham segregated from the said claim No. 15 and the said town site their interest therein by agreement with their associates and were allot-ed the south half of placer claim No. 15 in severalty as their portion of said town site, and thereupon they associated with themselves James A. Hamilton and H. J. Scott and sold to them some interest in their property aforesaid, and at the request of C. Hoffman and W. R. Stebbins aforesaid and for their use and benefit erected a valuable improvement, to wit, a two-story frame building for business purposes, on the lot No. 2 A aforesaid, and thereupon, after such segregation and improvements, to wit, on April 20th, 1877, the said Noah Siever, Edward Durham, James A. Hamilton, and H. J. Scott for a valuable consideration made, executed, and delivered to said C. Hoffman and W. R. Stebbins a further grant and deed of conveyance for the lot aforesaid purporting to be a grant in fee simple, with full covenants of seizin, quiet enjoyment, further assurance, general warranty, and against incumbrances, and that said grant and deed of conveyance was duly filed for record in the office of the register of deeds of Lawrence county on
220 the 20 day of April, 1877, and was duly recorded in Book A of Deeds, on page- 24–'5.

5. That thereafter the said C. Hoffman and W. R. Stebbins held and maintained possession of said property and used and occupied the same. Upon information and belief that on or about June 1st, 1878, the said C. Hoffman for a good and valuable consideration sold and by a good deed conveyed to W. R. Stebbins all his right, title, and interest in and to said property, and thereupon he entered into sole possession thereof; that said deed was duly filed for record in the office of the register of deeds of Lawrence county on or about

the 1st day of June, 1878, and duly recorded in Book of Deeds, at page —.

6. That on or about the 10th day of August, 1878, the said W. R. Stebbins for a good and valuable consideration sold and by a good deed conveyed to this defendant the real property before described; that the said deed was duly filed for record August 31st, 1878, in the office of the register of deeds aforesaid and duly recorded in Book 23, at page 54; and thereupon this defendant went into possession of said real property and ever since has been and now is in possession of the same, and that the said real property is the same as that described in plaintiffs' complaint and there alleged to be in defendant's possession.

7. Further, upon information and belief, that plaintiffs claim some interest in said real property and hold an outstanding apparent legal title thereto derived from the United States, the full facts in relation to which are as follows: That on the 16th day of March, 1877, the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton were the owners in possession of placer claim No. 15 as aforesaid, and thereafter made the deed as aforesaid
221 to defendant's grantors for the portion thereof aforesaid; but, upon information and belief, that on June 26th, 1877, the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, then being in possession of a remaining portion of said placer claim No. 15, sold and conveyed all their right, title, and interest therein to F. T. Sutherland, Henry Lake, and J. J. Sutherland, but that the said F. T. Sutherland, Henry Lake, and J. J. Sutherland then and there purchased the same with full notice and knowledge of the title and possession of C. Hoffman and W. R. Stebbins as aforesaid; that on the 25th day of July, 1877, the said J. J. Sutherland sold and conveyed his interest, being one-third interest, in said placer claim No. 15 to F. T. Sutherland, and on the same day F. T. Sutherland sold and conveyed an undivided one-third interest in said claim to Edward Welch; that on January 5th, 1878, Henry Lake sold and conveyed his interest (being an undivided one-third interest) in said placer claim No. 15 to Hugh McCaffrey and Henry Suessenbach; that thereupon said F. T. Sutherland, Edward Welch, Hugh McCaffrey, and Henry Suessenbach claimed to own said placer claim No. 15, but that their alleged ownership had been acquired with full notice and knowledge of the title and possession of C. Hoffman and W. R. Stebbins as aforesaid; that on or about the 15th day of May, 1878, the said F. T. Sutherland, Hugh McCaffrey, Henry Suessenbach, and Edward Welch, by Frank Welch, administrator of his estate (the said Edward Welch having in the meantime died), so claiming to be the owners of said claim as aforesaid, caused a survey thereof to be made and applied for a patent therefor in the U. S. land office, Deadwood, D. T., and such proceedings were had that on July 16th, 1878, the said parties last named made entry and purchase of said placer claim as mineral lot No. 86 at said land office, including that part
222 thereof belonging to defendant's grantors, C. Hoffman and W. R. Stebbins, and thereafter, February 15th, 1882, patent

issued therefor to Henry Suessenbach, Hugh McCaffrey, Frank T. Sutherland, and the heirs of Edward Welch; that said patent was filed for record in the office of the register of deeds of Lawrence county August 21st, 1882, and duly recorded in Book No. 26, at page 45; that prior to the issuance of said patent, to wit, July 6th, 1878, the said F. T. Sutherland had sold and conveyed all his right, title, and interest (being an undivided one-third) in said claim to Hugh McCaffrey and Henry Suessenbach by deed of that date filed for record July 21st, 1882, and recorded in Book No. 20, at page 428; that on or about the 5th day of August, 1882, Frank Welch, Samuel Welch, Mary Welch, Lydia E. Welch, and Mary E. Franklin, heirs-at-law of Edward Welch, deceased, sold and conveyed all their interest in said claim, being an undivided one-third, to Henry Suessenbach by deed of that date, filed for record August 5th, 1882, and recorded in Book No. 26, page 75; that on or about August 10th, 1882, Henry Suessenbach and Hugh McCaffrey sold and conveyed to Daniel McLaughlin and W. R. Steele an undivided one-fourth interest in their claim to the land in controversy described in the complaint and other lands by deed of that date, filed for record January 16th, 1883, and recorded in Book No. 26, at page 447.

8. Upon information and belief that all of said deeds were taken by the grantees with full notice and knowledge of the adverse possession of defendant's grantors aforesaid and of defendant and the title under which defendant claims, and that plaintiffs, by reason of the premises and the facts in this said counter-claim pleaded and set forth, hold their said title derived from the United States as aforesaid in trust for this defendant for that portion described in their complaint of which plaintiff *is* in possession, and should, in justice and equity, be required to convey to defendant.

9. That defendant has always been and now is ready and willing and hereby offers to pay to plaintiffs a just proportion of the legal expenses of procuring said patent to issue.

223 II.

For a second counter-claim—

1. That on the 28th day of March, 1877, and the 20th day of April, 1877, defendant's grantors, C. Hoffman and W. R. Stebbins, acquired title to the real property and premises in controversy by purchase from the owners thereof, as in the first counter-claim fully detailed and set forth, the allegations relating to which are now particularly referred to and made a part hereof the same as if here repeated.

2. That prior to the 8th day of May, 1878, defendant's said grantors had caused to be erected and made upon said real property certain valuable permanent improvements, to wit, a two-story frame building about twenty feet front by sixty feet deep, of the value of $3,000, and occupied and used the same for banking and other purposes, and thereafter sold the same to this defendant and conveyed the same as in the first counter-claim alleged; that prior to the 15th day of February, 1882, and prior to the issuance of the patent in the first counter-claim alleged, the said improvements having been destroyed

by fire, thereupon forthwith this defendant made and erected in lieu thereof upon the real property and premises aforesaid the certain valuable and permanent improvement ever since and now standing thereon, to wit a two-story brick building, twenty-one feet front by seventy feet in depth, affixed to the soil, of the value of $10,000, and has since used and occupied the same as a banking-house and for offices, &c.

3. That defendant's said grantors at the time of making said first-described improvement were holding under color of title adversely to the claim of plaintiffs and their grantors, to wit, under title derived from the locators and owners of the ground, as in the first counter-claim fully stated and set forth and now particularly referred
224 to, and that defendant at the time of making said last-described improvement was holding under color of title adversely to the claim of plaintiffs and their grantors, to wit, under title derived from the locators and owners of the ground aforesaid, through C. Hoffman and W. R. Stebbins, as before alleged.

4. That said valuable permanent improvement first named was made by defendant's grantors in good faith, claiming title as aforesaid, and while an occupant of the real property aforesaid, believing themselves to be the owners thereof, and the last-named valuable permanent improvement was made by defendant in good faith, claiming title as aforesaid, and while an occupant of the real property aforesaid, believing itself to be the owner thereof.

5. That the value of said real property, aside from the said valuable permanent improvement, is not to exceed $3,000.

Wherefore this defendant prays:

1. That plaintiffs may take nothing by this action.

2. That defendant may be decreed to have good and quiet title to the premises aforesaid, described as lot No. 2 A, on Main street, in the city of Deadwood, and as more particularly described in the complaint, and that plaintiffs have no right, title, interest, or estate therein.

3. That plaintiffs be required to convey to defendant all the right, title, interest, claim, and demand of every kind whatsoever in or to said property, and thereafter be forever barred from setting up or asserting any right, title, interest, or claim in or to said premises or any part thereof.

4. That in the event that it shall be determined that defendant is not the rightful owner of said real property, but that plaintiffs are entitled to recover the same, then that the value of the land, aside from the value of the improvements thereon, and also the sep-
225 arate value of the improvements, be specifically found, and that the defendant have judgment for the value of its said improvement, and that plaintiffs be required to pay to defendant the value of its improvements as so found.

5. For such other and further relief as may be equitable and right and the costs of this suit.

VAN CISE & WILSON AND
G. C. MOODY,
Att'ys for Def't.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

D. A. McPherson, being sworn, says he is an officer, to wit, cashier, of the defendant corporation. has heard the foregoing amended answer read, and the same is true of his own knowledge except as to matters therein stated on information and belief, and as to them he believes it to be true.

D. A. McPHERSON.

Subscribed and sworn to before me this 17th day of January, 1884.

B. P. DAGUE,
[SEAL.] *Notary Public.*

In district court. Henry Suessenbach *et al.*, pl'ff-, *vs.* The First National Bank of Deadwood, def't. Amended answer. Due service by copy admitted this 17th day of January, 1884, and consent is hereby given def. to amend. McLaughlin & Steele, att'ys for pl'ff-. Filed Dec. 22nd, 1884. A. R. Z. Dawson, clerk. Van Cise & Wilson, att'ys for def't.

226 TERRITORY OF DAKOTA, }
County of Lawrence. }

In District Court, First Judicial District.

HENRY SUESSENBACH, HUGH McCAFFREY, DANIEL McLAUGHLIN, and WILLIAM R. STEELE, Pl'ff's,
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, D. T., Def't.

Demurrer to Amended Answer.

Plaintiffs demur—

I.

To paragraph 3 in the amended answer of the defendant for the reason that the facts stated therein do not constitute a defense to the plaintiffs' action.

II.

To paragraph 4 in the amended answer of the defendant for the reason that the facts stated therein do not constitute a defense to the plaintiffs' action.

III.

To paragraph 5 in the amended answer of the defendant for the reason that the facts stated therein do not constitute a defense to the plaintiffs' action.

IV.

To the first counter-claim pleaded in said amended answer for the reason that the facts stated therein do not constitute a counter-claim or a defense to plaintiffs' action.

V.

To the second counter-claim pleaded in said amended answer for the reason that the facts stated therein do not constitute a counter-claim or a defense to plaintiffs' action.

227 McLAUGHLIN & STEELE,
Attorneys for Plaintiff-.

In district court. Henry Suessenbach *et al. vs.* The First National Bank of Deadwood, D. T. Demurrer to amended answer. Due service of the within demurrer to amended answer by copy admitted this 25 day of Jan'y, 1884. Van Cise & Wilson, G. C. Moody, att'ys for def't. Filed Jan. 26, 1884. A. R. Z. Dawson, clerk, by O. P. Stokes, deputy. McLaughlin & Steele, att'ys for pl'ffs.

228 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

In District Court, First Judicial District.

HENRY SUESSENBACH *et al.*, Pl'ffs,
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, DAKOTA, Def't.

Order.

This cause coming on for further hearing on this 6th day of July, 1885, on the demurrer heretofore interposed by plaintiffs to defendant's amended answer—

And the court being fully advised in the premises, it is now—

Ordered that said demurrer be, and the same is hereby, sustained to each defense demurred to and to each counter-claim pleaded and set out in said amended answer, and leave is hereby given said defendant to serve and file a second amended answer to said complaint on or before the fourth day of August, A. D. 1885, and that the cause remain on the calendar for trial.

By the court:

WILLIAM E. CHURCH, *Judge.*

In district court. Henry Suessenbach *et al. vs.* First Nat'l Bank of Deadwood. Order sustaining demurrer to amended answer. Filed July 7th, 1885. A. R. Z. Dawson, clerk.

229 TERRITORY OF DAKOTA, } ss:
First Judicial District, }

In the District Court in and for the County of Lawrence.

HENRY SUESSENBACH *et al.*, Plaintiffs,
vs.
FIRST NATIONAL BANK OF DEADWOOD, Defendant. } Certificate of Judge.

I, Chas. M. Thomas, associate justice of the supreme court of Dakota and judge of the first judicial district, do hereby direct and

authorize that copies of the papers constituting the judgment-roll in this action and of the amended answer, the demurrer thereto, and the ruling of the court thereon in this case, duly certified to by the clerk of this court, may be used in lieu of the originals as the transcript on appeal to the supreme court of the Territory in this case, and that the original notice of appeal and undertaking on appeal be attached to and made a part of said transcript.

CHAS. M. THOMAS, *Judge.*

Dated Deadwood, D. T., the 18th day of August, 1888.

230 TERRITORY OF DAKOTA, } ss:
First Judicial District, }

In the District Court in and for the County of Lawrence.

HENRY SUESSENBACH *et al.*, Plaintiffs,
vs.
FIRST NATIONAL BANK OF DEADWOOD, Defendant.

Order of the Judge as to what Constitutes the Transcript.

I, Chas. M. Thomas, associate justice of the supreme court and judge of the first judicial district, do hereby certify that the judgment-roll in the above-entitled case consists of the complaint, the second amended answer, the reply, the bill of exceptions, the findings of fact and conclusions of law, decision of the court, the motion to set aside and correct the findings of fact and conclusions of law and decision of the court, the ruling of the court thereon and the exceptions of the plaintiffs thereto, the motion to vacate the findings of fact and conclusions of law and for a new trial, the ruling of the court thereon and the exceptions by the plaintiffs thereto, the judgment and decree of the court and the exceptions thereto, constitute the judgment-roll in the above-entitled action, and that copies of the same, the notice of appeal and undertaking on appeal, and copies of the amended answer of defendant, of the demurrer thereto, and of the order of the court sustaining said demurrer, and the final certificate of the clerk of the district court constitute the transcript of the above-entitled cause in this court to the supreme court of this Territory.

CHAS. M. THOMAS, *Judge.*

Dated Deadwood, D. T., August 18th, 1888.

231 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

First Judicial District.

I, W. H. Jones, clerk of the district court within and for the said county of Lawrence, in the first judicial district of the Territory of Dakota, do hereby certify that the above and foregoing books, part I and II, *is* a full, true, correct, and complete transcript of the judgment-roll, the notice of appeal and undertaking on appeal, with proof

of service thereof, and of the orders appealed from, and of all the papers and proceedings upon which such orders were granted, and the certificate of the judge in said action wherein Henry Suessenbach, Hugh McCaffrey, Danial McLaughlin, William R. Steele are plaintiffs and The First National Bank of Deadwood, Dakota, is defendant, as the same now remains of record in the said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 8th day of September, A. D. 1888.

[SEAL.] W. H. JONES, *Clerk.*

232 TERRITORY OF DAKOTA, } ss:
First Judicial District, }

In the District Court in and for Lawrence County.

HENRY SUESSENBACH *et al.*, Plaintiffs,
vs.
FIRST NATIONAL BANK OF DEADWOOD, Defendant. } Certificate of Judge.

I, Chas. M. Thomas, associate justice of the supreme court of Dakota, and presiding judge of the first judicial district, do hereby certify that I am well acquainted with the signature of Wm. H. Jones, clerk of said first judicial district court in and for Lawrence county; that his signature to the foregoing certificate is his true and genuine signature, with the seal of said court affixed thereto, and that said certificate is in due form.

Dated Deadwood, D. T., August 18th, 1888.

CHAS. M. THOMAS, *Judge.*

233 In the Supreme Court of the Territory of Dakota.

HENRY SUESSENBACH, HUGH MCCAFFREY, DANIEL MCLAUGHLIN, and WILLIAM R. STEELE, Appellants
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, DAK., Respondent.

Assignments of Error.

The appellants assign as error in this court, for which the judgment in the district court should be reversed, the following errors, apparent on the face of the record in that court and in the transcript in this:

I.

The court erred in receiving in evidence on the part of the defendant against plaintiffs' objection the exemplified copy from the office of the Commissioner of the General Land Office, at Washington, of date January 19th, 1884, of the proceedings under which plaintiffs' patent was acquired. (Trans. Record, p. 55 and p. 103; printed abst., p. 92.)

II.

The court erred in receiving in evidence on the part of the defendant against plaintiffs' objection the purported rules and regulations of the miners of the so-called Whitewood mining district, adopted April 8th, 1876. (Trans. Rec., 106; pr. abst., p. 94-96.)

III.

The court erred in receiving in evidence on the part of the defendant against plaintiffs' objection the pretended Record Book A of Whitewood mining district, especially the so-called record of relocation of placer claim No. 15 above discovery, on Whitewood gulch, on page 216. (Trans., p. 109; abst., p. 96.)

234

IV.

The court erred in receiving in evidence on the part of the defendant against plaintiffs' objection the so-called Record Book A of Whitewood mining district to prove the existence of a custom of recording mining location certificates with a mining recorder at the time of the relocation of said placer claim No. 15 by Seaver, Durham, Moore and Clifton, March 16th, 1877. (Trans., 110; abst., 97.)

V.

The court erred in admitting in evidence on the part of the defendant against plaintiffs' objection the said so-called Record Book A of Whitewood mining district to identify the signature of Frank Sutherland to the relocation record of said placer claim No. 15 in said book. (Trans., 110; abst., 94.)

VI.

The court erred in admitting in evidence on the part of the defendant against plaintiffs' objection the record of a written conveyance, on page 257 of said Record Book A, purporting to have been made by Noah Siever, Edward Durham, William Moore, and Thomas Clifton, April 13th, 1877, conveying placer claim No. 15 above discovery, on Whitewood gulch, to F. T. Sutherland, H. F. Lake, and J. J. Sutherland (Trans., 111; abst., 99), and a record of a purported transfer, July 25, 1877, from J. J. Sutherland to F. T. Sutherland. (Trans., 113; abst., p. 99.)

VII.

The court erred in admitting in evidence on the part of the defendant against plaintiffs' objection the testimony of Noah Siever regarding the relocation of placer claim No. 15 above discovery, on Whitewood gulch, by himself, Durham, Moore, and Clifton
235 and making a record thereof in Book A by Frank Sutherland and regarding an understanding among themselves and other placer-mine claimants to lay off their claims into town lots as the town site of Deadwood. (Trans., 111; abst., 101–116.)

VIII.

The court erred in admitting in evidence on the part of the defendant against the plaintiffs' objection the testimony of Noah Siever and the deed of date March 28th, 1887, made by Siever, Durham, Moore, and Clifton to Hoffman and Stebbins, purporting to convey to the latter lot 2 A, in the town site of Deadwood, and also the deed of date March 27th, 1877, acknowledged April 29th, 1877, made by Siever, Durham, Hamilton, and Scott to the same parties, purporting to convey the lot to them. (Trans., 114 to 124; abst., 106 & 107.)

IX.

The court erred in admitting in evidence on the part of the defendant against plaintiffs' objection the testimony on Noah Siever in relation to an oral agreement had by him with Frank T. Sutherland that preceded the written contract of sale of placer claim No. 15 to Frank T. Sutherland, dated April 13th, 1877. (Trans., p. 126; abst., 111.)

X.

The court erred in admitting in evidence on the part of the defendant against plaintiffs' objection the deposition of S. N. Wood and W. R. Stebbins. (Trans., 131; abst., 116.)

XI.

The court erred in admitting in evidence on the part of the defendants against plaintiffs' objection the quitclaim deed of W. R. Stebbins of date August 10th, 1878, to the defendant of the lot in controversy. (Trans., 133; abst., 117.)

236 XII.

The court erred in admitting in evidence on the part of the defendant against plaintiffs' objection the testimony of Donald A. McPherson and others, witnesses as to the separate value of the lot in controversy aside from the improvements thereon, and the separate value of the improvements. (Trans., 139 to 141; abst., 119.)

XIII.

The court erred in making the finding of fact marked I and in refusing to strike out the same at plaintiffs' request. (Trans., 153; abst., 137.)

XIV.

The court erred in making the finding of fact marked II and in refusing to strike out the same at plaintiffs' request. (Trans., 154–172; abst., 138.)

XV.

The court erred in making finding of fact marked III and in not striking the same out at plaintiffs' request. (Trans., 155–172; abst., 138.)

XVI.

The court erred in making finding of fact marked IV and in not striking out the same at plaintiffs' request. (Trans., 156; abst., 139.)

XVII.

The court erred in making finding of fact marked V and in not striking out the same at plaintiffs' request. (Trans., 126–173; abst., 140.)

XVIII.

The court erred in making finding of fact marked VI and in not striking the same out at plaintiffs' request. (Trans., 160–173; abst., 142.)

237

XIX.

The court erred in making finding of fact marked VII and in not striking the same out at plaintiffs' request. (Trans., 160–173; abst., 143.)

XX.

The court erred in making finding of fact numbered VIII and in not striking the same out at plaintiffs' request. (Trans., pp. 160 to 173; abst., 143.)

XXI.

The court erred in making finding of fact numbered nine and in not striking the same out at plaintiffs' request. (Trans., pp. 171 to 174; abst., 143.)

XXII.

The court erred in making finding of fact numbered X and in not striking out the same at plaintiffs' request. (Trans., pp. 162–176; abst., 144.)

XXIII.

The court erred in making finding of fact numbered XI and in not striking out the same at plaintiffs' request. (Trans., 162–176; abst., 145.)

XXIV.

The court erred in making finding of fact number XII and in not striking out the same at plaintiffs' request. (Trans., p. 163–176; abst., 145.)

XXV.

The court erred in making finding of fact numbered XIII and in not striking out the same at plaintiffs' request. (Trans., p. 164–177; abst., 147.)

238 XXVI.

The court erred in making finding of fact numbered XIV and in not striking the same out at plaintiffs' request. (Trans., p. 165–177; abst., p. 174.)

XXVII.

The court erred in making finding of fact numbered XVIII and XIX and in not striking the same out at plaintiffs' request. (Trans., p. 166–178; abst., 149.)

XXVIII.

The court erred in making finding of fact marked XX and in not striking the same out at plaintiffs' request. (Trans., 166–178; abst., 149.)

XXIX.

The court erred in its first conclusion of law and in refusing to strike out the same at plaintiffs' request. (Trans., p. 167–179; abst., 149.)

XXX.

The court erred in its second conclusion of law and in refusing to strike out the same at plaintiffs' request. (Trans., pp. 167–179; abst., 150.)

XXXI.

The court erred in its third conclusion of law and in refusing to strike out the same at plaintiffs' request. (Trans., pp. 168–173; abst., 151.)

XXXII.

The court erred in its fourth conclusion of law and in refusing to strike out the same at plaintiffs' request. (Trans., pp. 169–184; abst., 151.)

239 XXXIII.

The court erred in its fifth conclusion of law and in refusing to strike out the same at plaintiffs' request. (Trans., p. 169–184; abst., 151.)

XXXIV.

The court erred in its sixth conclusion of law and in refusing to strike out the same at plaintiffs' request. (Trans., p. 169–185; abst., 152.)

XXXV.

The court erred in making its findings of fact and conclusions of law and each of them. (Trans., 190–185; abst., 152.)

XXXVI.

The court erred in denying the plaintiffs' motion to vacate its findings of fact — conclusions of law. (Trans., p. 185; abst., 152.)

XXXVII.

The court erred in denying plaintiffs' motion for a new trial.

(Endorsed:) In supreme court. Henry Suessenbach, Hugh McCaffrey, Daniel McLaughlin, and William R. Steele, appellants, *vs.* The First National Bank of Deadwood, Dakota, respondent. Assignments of error. 437. Supreme court of the Territory of Dakota. Filed Oct. 1, 1888. J. H. C. Young, clerk.

240 THE UNITED STATES OF AMERICA, *Territory of Dakota*, } *ss*:

In the Supreme Court, October Term, A. D. 1888.

HENRY SUESSENBACH, HUGH MCCAFFREY, DANIEL MCLAUGHLIN, and WILLIAM R. STEELE, Plaintiffs and Appellants,
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, Defendant and Respondent.

Appeal from the district court of Lawrence county.

This action coming on to be heard at the October, A. D. 1888, term of this court, at the supreme court room, in the city of Deadwood, Territory of Dakota—present, Bartlett Tripp, chief justice, and William B. McConnell, Charles M. Thomas, James Spencer, John E. Carland, and Roderick Rose, associate justices—and the appeal herein having been argued by Daniel McLaughlin, Esq., and W. R. Steele, Esq., for the appellant, and by G. C. Moody, Esq., and Edwin Van Cise, Esq., for respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Lawrence county, appealed from herein, be, and the same is hereby, affirmed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that respondent have and recover of the appellant its costs and disbursements on this appeal expended, taxed and allowed at fifty-nine & $\frac{30}{100}$ dollars.

By the court:

BARTLETT TRIPP,
Chief Justice.

All concur, Justice Thomas not sitting.

241 (Endorsed:) In supreme court, Territory of Dakota. October term, 1888. Henry Suessenbach, Hugh McCaffrey, Daniel McLaughlin, & William R. Steele, plaintiff- and appellants, *vs.* The First National Bank of Deadwood, defendant and respondent. Filed in open court this 13th day of October, 1888. J. H. C. Young, clerk.

242 SUESSENBACH
vs.
THE FIRST NATIONAL BANK OF DEADWOOD. } 22 437.

The judgment in this action is affirmed for the reason:

1st. That defendant was not compelled to adverse the claim of the plaintiffs' grantors when they applied to purchase from the U. S. land in controversy, as any title obtained through that patent would enure to the benefit of defendant.

2. That the admission in evidence of the transcript of the proceedings of the U. S. land office and mining rules, if error, was not prejudicial, as defendant was not seeking to impeach the validity of the patent, but endeavoring to be admitted to a share in the benefits.

243 *Notice of Appeal.*

In the Supreme Court, Dakota Territory.

HENRY SUESSENBACH, HUGH MCCAFFREY, DANIEL MCLAUGHLIN, and WILLIAM R. STEELE, Appellants,
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, Respondent.

The above-named Henry Suessenbach, Hugh McCaffrey, Daniel McLaughlin, and William R. Steele, appellants, feeling themselves aggrieved by the final judgment and decree of the supreme court of the Territory of Dakota, made and entered on the 13th day of October, A. D. 1888, in the above-entitled cause, do hereby appeal therefrom to the Supreme Court of the United States, and they pray that their appeal may be allowed, and that a transcript of the record, proceedings, bill of exceptions, etc., in said cause, duly authenticated, may be sent to the Supreme Court of the United States.

McLAUGHLIN & STEELE,
Attorneys for Appellants.

October 25th, 1888.

(Endorsed:) No. 437. In supreme court. Henry Suessenbach *et al. vs.* First National Bank of Deadwood. Notice of appeal. The appeal in the within and foregoing case is allowed, and the clerk of said supreme court of Dakota will transmit the record and proceedings in said cause, as prayed, to the Supreme Court of the United States. Bartlett Tripp, chief justice of the supreme court of the Territory of Dakota. Service of a copy of the within notice of ap-

peal on us acknowledged this 31st day of October, 1888. G. C. Moody, att'y for respondent. Supreme court of the Territory of Dakota. Filed Nov. 3, 1888. J. H. C. Young, clerk.

244 *Bond on Appeal.*

In the Supreme Court of the Territory of Dakota.

HENRY SUESSENBACH, HUGH MCCAFFREY, DANIEL MCLAUGHLIN, and WILLIAM R. STEELE, Appellants,
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, Respondent.

Know all men by these presents that we, Henry Suessenbach and Hugh McCaffrey, both residents of Omaha, Douglas county, State of Nebraska; Daniel McLaughlin and William R. Steele, both of Deadwood, Lawrence county, Dakota Territory, as principals, and W. E. Lowe and J. F. Irwin, of said Lawrence county, Dakota Territory, as sureties, are held and firmly bound unto the First National bank of Deadwood, Dakota, in the sum of one thousand dollars, lawful money of the United States, to be paid to said First National Bank, it ssuccessors or assigns; to which payment, well and truly to be made, we bind ourselves and each of ourselves, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 27th day of October, A. D. 1888.

Whereas the above-named Henry Suessenbach, Hugh McCaffrey, Daniel McLaughlin, and William R. Steele have appealed to the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled action by the supreme
245 court of the Territory of Dakota on the 13th day of October, A. D. 1888:

Now, therefore, the condition of this obligation is such that if the above-named principals shall prosecute their said appeal to effect and answer to all costs and damages, including just damages for delay and costs and interest on the appeal, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

Witness our hands and seals this 27th day of October, 1888.

HENRY SUESSENBACH.	[SEAL.]
HUGH MCCAFFREY.	[SEAL.]
DANIEL MCLAUGHLIN.	[SEAL.]
WILLIAM R. STEELE.	[SEAL.]
W. E. LOWE.	[SEAL.]
J. F. IRWIN.	[SEAL.]

STATE OF NEBRASKA, } ss:
County of Douglas, }

Be it remembered that on this 27th day of October, 1888, personally appeared before me, clerk of the district court in and for said

county, Henry Suessenbach and Hugh McCaffrey, known to me to be the persons whose names are subscribed to the foregoing instrument and who are described therein, and who duly acknowledged to me that they executed the same freely and voluntarily.

Given under my hand and official seal the day and year above written.

FRANK E. MORRIS,
Clerk as Aforesaid,
[SEAL.] By V. M. MACKEY, *Deputy.*

246 TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

Personally appeared before the undersigned, a notary public in and for said county, on this 29th day of October, 1888, the above-named Daniel McLaughlin, William R. Steele, W. E. Lowe, and J. F. Irwin, known to me to be the identical persons described in and whose names are subscribed to the foregoing instrument, who acknowledged to me that they executed the same freely and voluntarily.

Given under my hand and official seal the day and year above written.

WILLIAM L. McLAUGHLIN,
[SEAL.] *Notary Public.*

247 TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

W. E. Lowe and J. F. Irwin, being first duly sworn, deposes and says, each for himself and not one for the other, that he is a resident and householder in said county of Lawrence, and that he is worth the sum of two thousand dollars over and above his debts and liabilities and in property subject to execution.

W. E. LOWE.
J. F. IRWIN.

Subscribed and sworn to before me this 29th day of October, 1888.

WILLIAM L. McLAUGHLIN,
[SEAL.] *Notary Public.*

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

I hereby certify that I am well acquainted with W. E. Lowe and J. F. Irwin, sureties on the foregoing appeal bond in the case of Henry Suessenbach *et al. ve.* The First National Bank of Deadwood, Dakota; that I know that each is a freeholder and resident of this Territory, and I consider each of them worth the amount for which he has qualified in said bond over and above all his debts and liabilities and exemptions allowed by law, and that they are amply good and sufficient sureties on said bond on appeal.

Witness my hand and the seal of the said district court this 30th day of October, 1888.

[SEAL.] W. H. JONES, *Clerk.*

248 I approve the foregoing bond an- the sufficiency of the sureties thereto this 3d day of November, A. D. 1888.

BARTLETT TRIPP,
Chief Justice Sup. C't, Dakota Territory.

(Endorsed:) No. 437. In supreme court. Henry Suessenbach *et al. vs.* The First National Bank of Deadwood. Appeal bond to U. S. Sup. Court. Service of a copy of the within bond on us this 31st day of October, 1888. G. C. Moody, att'y for respondent. Supreme court of the Territory of Dakota. Filed Nov. 3, 1888. J. H. C. Young, clerk.

249 UNITED STATES OF AMERICA:

To the First National Bank of Deadwood, Dakota:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1889, pursuant to an appeal filed in the clerk's office of the supreme court of the Territory of Dakota, wherein Henry Suessenbach, Hugh McCaffrey, Daniel McLaughlin, and William R. Steele are appellants and you are respondent and appellee, to show cause, if any there be, why the judgment and decree in the said appeal mentioned should not be corrected and speedy justice should — be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3rd day of November, A. D. 1888.

BARTLETT TRIPP,
Chief Justice of the Supreme Court of the Territory of Dakota.

(Endorsed:) Citation. Henry Suessenbach *et al. vs.* The First National Bank of Deadwood. Service of a copy of the within citation upon me admitted this 10th day of November, 1888. G. C. Moody, attorney for respondent. Supreme court of the Territory of Dakota. Filed Nov. 24, 1888. J. H. C. Young, clerk.

250 UNITED STATES OF AMERICA, *Territory of Dakota,* } *ss:*

In Supreme Court.

Cause:

HENRY SUESSENBACH, HUGH MCCAFFREY, DANIEL MCLAUGHLIN, and WILLIAM R. STEELE, Plaintiffs and Appellants,

vs.

THE FIRST NATIONAL BANK OF DEADWOOD, Defendant and Respondent.

Filed September 17, 1888.

Journal Entries.

UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

In Supreme Court, October Term, 1888.

Tuesday, October 2, 1888, being the first day of the term.

* * * * * * *

On call of calendar.

* * * * * * *

In—

HENRY SUESSENBACH, HUGH MCCAFFREY, DANIEL MCLAUGHLIN, and WILLIAM R. STEELE, Plaintiffs and Appellants,
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, Defendant and Respondent.

Counsel answers ready.

* * * * * * *

Monday, October 8, 1888, being the sixth day of the term.

* * * * * * *

251 In—

HENRY SUESSENBACH, HUGH MCCAFFREY, DANIEL MCLAUGHLIN, and WILLIAM R. STEELE, Plaintiffs and Appellants,
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, Defendant and Respondent.

Cause argued.

Saturday, October 13, 1888, being the eleventh day of the term.

* * * * * * *

In—

HENRY SUESSENBACH, HUGH MCCAFFREY, DANIEL MCLAUGHLIN, and WILLIAM R. STEELE, Plaintiffs and Appellants,
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, Defendant and Respondent.

Judgment of the district court within and for the county of Lawrence affirmed.

* * * * * * *

In—

HENRY SUESSENBACH, HUGH MCCAFFREY, DANIEL MCLAUGHLIN, and WILLIAM R. STEELE, Plaintiffs and Appellants,
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, Defendant and Respondent.

Counsel for plaintiff & appellant, W. R. Steele, Esq., asks to be allowed appeal to the Supreme Court of the United States.

Appeal allowed and bond fixed at one thousand dollars.

Monday, February 4, 1889, being the twelfth day of the term.

* * * * * * *

In—

HENRY SUESSENBACH, HUGH MCCAFFREY, DANIEL MCLAUGHLIN, and WILLIAM R. STEELE, Plaintiffs and Appellants,
vs.
THE FIRST NATIONAL BANK OF DEADWOOD, Defendant and Respondent.

Opinion, Carland, J., filed.

252 CARLAND, *J.*:

This action was brought in the district court of Lawrence county by the appellants to recover the possession of a parcel of land situate, lying, and being in the city of Deadwood, county of Lawrence, Territory of Dakota, and more particularly described as follows: Commencing at the northeast corner of Main and Lee streets, thence running in a northeasterly direction along the line of said Main street 21.5 feet, thence at right angles to said Main street in a northwesterly direction 100 feet to place of beginning, being lot No. 2, in block No. 3, and a part of mineral claim No. 86, as patented by the United States. The appellants deraigned their title from the United States through the usual mineral certificate or patent and several mesne conveyances from the original patentees and their grantees. The respondent, in order to defeat the claim of the appellants, set up by its answer several equitable defenses, and asked that the plaintiffs be declared by the judgment of the court to hold the premises hereinbefore described in trust for the respondent, and that, upon the payment of certain costs and expenses expended in obtaining the patent, the plaintiffs be compelled to convey said premises to the respondent. As to the mode of procedure at the trial more will be said further on in this opinion. The court found that the equitable claim of the respondent was a valid one, and rendered judgment in accordance with the prayer of its answer. The court found the facts to be substantially as follows:

That on the 28th day of February, 1877, the land in controversy and the land contiguous thereto and surrounding it was a part of the unappropriated public domain of the United States and was land

valuable for minerals and contained valuable mineral deposits, to wit, gold, and what is known and called "placer ground," and upon said day Noah Siever, Edward Durham, William Moore, and Thomas Clifton were citizens of the United States and had theretofore entered upon and explored the same and discovered valuable mineral deposits therein, to wit, gold; and on the 16th day of March, 1877, the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton duly located, claimed, and appropriated the same as placer mining ground, the same being known and called "placer claim No. 15" above discovery, on Whitewood gulch, in Whitewood mining district, Lawrence county, Dak., in accordance with the customs laws of the United States, the local laws, and the customs, rules, and regulations of miners in said mining district, by distinctly marking the surface boundaries of said claim so that they could be readily traced on the ground; by setting substantial stakes at each corner of said claim and on the sides thereof, with the name of the claim marked thereon and the name of the locators, and by putting a plain sign or notice at the points of discovery thereon containing the name of the claim as "Placer claim No. 15" above discovery and the names of the locators, to wit, Noah Siever, Edward Durham, William Moore, and Thomas Clifton, and the date of location, to wit, March 16, 1877, and by filing and recording a certificate of location in the records of the recorder of said Whitewood mining district; and said locators remained in continuous possession of said placer claim, working and developing the same, until their sale and transfer as hereinafter stated; that during the months of March and April, 1877, said Noah Siever and his said associates expended more than $500 in value in labor and improvements in working and developing said placer claim No. 15, said placer claim No. 15 containing not to exceed four acres and no more than was allowed by the local laws, rules, and regulations in force in said mining district; that on the 28th day of March, 1877, the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, being then the owners of and in actual possession of said placer claim No. 15 as aforesaid, claiming the same under the mineral land laws of the United States, for a valuable consideration made, executed, and delivered to William R. Stebbins and C. Hoffman, who were citizens of the United States, their deeds of conveyance for a portion of said placer mining claim described in said deed as lot No. 2 A, on Main street, in the town of Deadwood, county of Lawrence, and Territory of Dakota, which are the same premises in controversy in this action, and then and there delivered possession of said premises to said Stebbins and Hoffman; which deed was afterwards filed for record in the register of deeds' office of Lawrence county on the 25th day of April, 1877, and recorded in volume A, page 77, of the records of said office, and which deed was in the words and figures following:

"Noah Siever, Edward Durham, William Moore, and Thomas Clifton, of Deadwood, Lawrence county, Territory of Dakota, agree with William R. Stebbins and C. Hoffman, of the same place, that,

in consideration of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, the said Stebbins and Hoffman have full right to occupy and possess lot No. 2 A, on Main street, in the town of Deadwood, county and Territory aforesaid, the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, being the owners of placer claim No. 15 above discovery, in Whitewood mining district, county and Territory aforesaid, hereby deeding and conveying to said Stebbins and Hoffman all their claim, right to possess, or title they may have by reason and virtue of said placer claim to said premises, excepting the right to mine for gold under said premises, and then such mining to be done after giving reasonable notice to said Stebbins and Hoffman and all reasonable precautions to carry on said mining to be used to prevent damage and injury to said premises.

253 "In witness whereof we hereunto set our hands and seals.

Done at Deadwood, Lawrence county, Territory of Dakota, this 28th day of March, A. D. 1877.

"NOAH SIEVER. [L. S.]
"EDWARD DURHAM. [L. S.]
"WILLIAM MOORE. [L. S.]
"THOMAS CLIFTON. [L. S.]

"In presence of—
"E. C. BREARLEY."

That prior to the execution of the conveyance last named said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, having agreed with owners of other placer claims immediately contiguous to said placer claim No. 15, to wit, No. 13 and 14, laid out and platted a town or city upon their claims 13, 14, and 15, calling it Deadwood, agreeing that the owners of each placer claim respectively should be the owners of the lots and blocks of said town or city within the limits of such claim; that subsequently, by allotment and segregation, the said Noah Siever and Edward Durham became the sole claimants to lot No. 2 A, on Main street, in Deadwood, the premises now in controversy, and a part of said placer claim No. 15; that prior to the conveyance of March 28, 1877, hereinbefore referred to, from Siever, Durham, Moore, and Clifton, said Siever and Durham had employed James A. Hamilton and H. J. Scott to aid them in constructing a building on said lot No. 2 A, and for their aid had promised them an interest in said lot and in said building, and on the 27th day of March, 1877, the said Noah Siever, Edward Durham, James A. Hamilton, and H. J. Scott, for a valuable consideration, to wit, $3,000, then paid to them by said Stebbins and Hoffman, made, executed, and delivered to the said W. R. Stebbins and C. Hoffman a deed to said lot No. 2 A, the premises in controversy, which deed was duly acknowledged, and on the 20th day of April, 1877, was duly recorded in Book A of Deeds, pages 24, 25, in the office of the register of deeds for Lawrence county, and is in words and figures following, to wit:

"This indenture, made the 27th day of March, A. D. 1877, between Noah Siever, Edward Durham, James A. Hamilton, and H. J. Scott, of Deadwood, Lawrence county, Territory of Dakota, parties of the first part, and William R. Stebbins and C. Hoffman, of the same place, parties of the second part, witnesseth: The said parties of the first part, for and in consideration of the sum of three thousand dollars to them in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, have remised, released, and forever quitclaimed, and by these presents do remise, release, and forever quitclaim, unto the said parties of the second part and to their heirs and assigns all of the following-described real estate or landed claim or possessory right or property, situated and being in Deadwood, Lawrence county, Territory of Dakota, to wit, lot No. 2 A, as located by the parties of the first part March 15, A. D. 1877, and recorded in Book B, page twenty-three, of the records of said Deadwood. The lot No. 2 A is more particularly described as being situated on Main street, in said Deadwood, having a frontage of twenty feet on Main street and running back to the depth of one hundred feet. There is now upon said lot one two-story building nearly completed, with a frontage of twenty feet and a depth of fifty feet, together with all the rights, privileges, and franchises thereto incident, appendant, or appurtenant or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and the rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, or to the said premises and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the said premises and privileges thereto incident unto the said parties of the second part, their heirs and assigns forever; and the said Noah Siever, Edward Durham, James A. Hamilton, and H. J. Scott, for themselves and their assigns and representatives, do hereby covenant and agree that they have full right and power to deed and convey the said premises, and that this conveyance does convey to William R. Stebbins and C. Hoffman, parties of the second part, their heirs and assigns, the full possession, right of possession, and property in and to said lot No. 2 A as against any individual, individuals, corporation, corporations, whomsoever or whatsoever, notwithstanding forever; and the parties of the first part do further agree to sustain and defend the title and possession of the said parties of the second part to the said premises as against any individual, individuals, corporation, or corporations. The said parties of the first part further agree that if any suit or suits be commenced against the said parties of the second part involving the title to or the right of possession of the property herein conveyed the said suit or suits will be defended and contested at the sole expense and cost of the parties of the first part, who hereby solemnly agree to keep said parties of the second part free and clear of any costs or damages that may occur by reason of any litigation in the premises.

"In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

"NOAH SIEVER. [L. S.]
"EDWARD DURHAM. [L. S.]
"JAMES A. HAMILTON. [L. S.]
"H. J. SCOTT. [L. S.]

"Signed, sealed, and delivered in the presence of—
"E. C. BREARLEY.
"JOHN WOLZMUTH.
"CHRISTIAN FLUCKEN."

(Acknowledgment.)

254 That this building thus erected by Siever, Durham, Hamiton, and Scott was a two-story frame building, about 20 feet front on Main street by 60 feet deep, and the possession thereof was delivered to said Stebbins and Hoffman April 21, 1877; that said building and lot was used as a bank by the banking firm of Stebbins, Wood & Post and for offices used and rented by them, the said William R. Stebbins being a member of the firm of said Stebbins, Wood & Post; that on or about August 1, 1877, the said Hoffman conveyed his interest in the premises in controversy to said William R. Stebbins, which conveyance was duly recorded on or about said date; that said banking firm of Stebbins, Wood & Post continued to occupy and possess under said conveyance and delivery of possession the said premises until about July, 1878, when the respondent was organized as a national bank under the laws of Congress, and succeeded to the business of said Stebbins, Wood & Post, and immediately went into possession and control of the said premises in controversy, and by a deed dated the 10th day of August, 1878, and acknowledged on the 24th day of the same month the said William R. Stebbins sold, transferred, and conveyed said property to the respondent, which deed was duly filed for record August 31, 1878, and duly recorded in Book 23, page 54, of the records of the register of deeds' office of said Lawrence county, and said respondent has continued in the possession of said disputed premises ever since the delivery of possession to it by the said Stebbins, Wood & Post, in July, 1878; that on or about June 26, 1877, the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, being in possession of said placer claim and claiming to be the owners thereof by virtue of the location heretofore stated, subject to the rights theretofore transferred by them to said Stebbins and Hoffman, for the consideration of $1,600 sold to F. T. Sutherland, H. F. Lake, and J. J. Sutherland all their right, title, and interest in and to said placer claim No. 15 and gave to the said Sutherland, Lake, and Sutherland a bill of sale therefor, which was on said date filed in the office of the recorder of the mining district, who was then the said J. J. Sutherland; that at the time of the execution of this bill of sale said Noah Siever and his associates delivered to the said Sutherland, Lake, and Sutherland possession of that portion of said placer claim the possession of which remained in them, but ex-

pressly reserved therefrom said lot No. 2 A, theretofore conveyed by them, as hereinbefore stated, to Stebbins and Hoffman, and of which said Stebbins and Hoffman were then in possession, and, as a part of the consideration for the sale of said placer claim No. 15 to said Frank T. Sutherland, H. F. Lake, and J. J. Sutherland, Sutherland, Lake, and Sutherland agreed with said Noah Siever and his associates to protect and respect and defend the title and possession of said William R. Stebbins and C. Hoffman to that part of placer-claim No. 15 described as said lot No. 2 A, on Main street, Deadwood, and to keep and make good to them or their heirs and assigns the covenants contained in the said deeds of Siever, Durham, Clifton, and Moore and of Siever, Durham, Hamilton, and Scott to the said Stebbins and Hoffman, hereinbefore set forth; that on the 25th day of July, 1877, the said J. J. Sutherland sold his interest in placer claim No. 15 to F. T. Sutherland, and on the same day said F. T. Sutherland sold and conveyed such J. J. Sutherland interest to Edward Welch; that on January 5, 1878, H. F. Lake sold and conveyed his interest to Hugh McCaffrey and Henry Suessenbach, two of the plaintiffs herein; that on the 29th day of January, 1878, Edward Welch, Frank T. Sutherland, Hugh McCaffrey, and Henry Suessenbach filed in the office of the register of deeds of Lawrence county and had recorded in Book B, miscellaneous records, of said office, at page 324, an instrument in words and figures following, to wit, as an amended location certificate of said placer claim No. 15:

"Notice is hereby given that the undersigned, for the purpose of more clearly defining the boundaries of placer claim No. 15 above discovery, on Whitewood mining district, in Lawrence county, Dakota Territory, do, on this 28th day of January, 1878, file this our amended certificate, and described more particularly as per survey of the annexed field-notes.

"(Signed) EDWARD WELCH.
"FRANK T. SUTHERLAND.
"HUGH McCAFFREY.
"HENRY SUESSENBACH."

Appended to this were field-notes made by Henry Rholeder, surveyor, showing courses and distances and describing the tract as containing three and forty-six one-hundredths acres; that on the 15th day of May, 1878, the said F. T. Sutherland, Hugh McCaffrey, Henry Suessenbach, and Edward Welch, by Frank Welch, administrator, the said Edward Welch having in the meantime died, filed in the United States land office at Deadwood, D. T., an application for patent for said placer claim No. 15 above discovery. The application to enter was sworn to by said Frank T. Sutherland. In said application the said Sutherland, McCaffrey, Suessenbach, and Welch traced their title to and claimed said entry under and by virtue of said location of said placer claim, made the 16th day of March, 1877, by said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, heretofore stated, and claimed the right to make said entry and obtain title to said premises under and by virtue of said loca-

tion, and there was appended to said application, as a part thereof, an abstract of title from the records of the Whitewood mining district, as follows:

"*Abstract of Title, Claim No.* 15.

"Claim No. 15, above discovery, was located January 16, A. D. 1876, by G. W. Wilkinson; see Book A, page 36. August
255 19, 1876, one-half interest relocated by Edward Durham, Noah Siever, Thomas Clifton, and William Moore; see Book A, page 69. March 22, 1876, contract to transfer for work to J. A. Hamilton, if filled; see Book A, page 99. July 11, 1876, bill of sale from W. A. Gamble and A. Stein to T. Clifton and W. Moore, one-half interest; see Book A, page 151. March 15, 1877, relocated by J. H. McCutcheon; see Book A, page 216. March 16, 1877, relocated by Noah Siever, E. Durham, Thomas Clifton, and William Moore; see page 216. June 26, 1877, bill of sale from Noah Siever, E. Durham, Thomas Clifton, and William Moore to F. T. Sutherland, Henry Lake, and J. J. Sutherland; see page 257. July 25, 1877, bill of sale for one-third interest from J. J. Sutherland to F. T. Sutherland."

From the office of the register of deeds the following:

"*Abstract of Title, Placer Claim No.* 15 *Above Discovery, Whitewood Placer Mining District, Lawrence County, Dakota Territory.*

"Edward Welch, Frank T. Sutherland, Hugh McCaffrey, and Henry Suessenbach, relocators. Certificate and survey dated January 28, 1878; filed January 29, 1878; recorded in Book B, page 324. Amended location certificate with field-notes of survey attached. F. T. Sutherland to Edward Welch. Deeds dated July 25, 1877; acknowledged July 25, 1877; filed July 25, 1877; consideration, two thousand dollars; an undivided one-third interest. H. F. Lake to Hugh McCaffrey and Henry Suessenbach. Deed dated January 5, 1878; acknowledged January 5, 1878; filed January 17, 1878; recorded in Book F, page 152; consideration, one thousand dollars; an undivided one-third interest."

That thereafter such proceedings were had pursuant to said application for patent, as hereinbefore stated, that on July 16, 1878, an entry and purchase of said placer claim No. 15 above discovery was made at said United States land office at Deadwood, Dak., in the name of said F. T. Sutherland, Hugh McCaffrey, Henry Suessenbach, and Frank Welch, administrator of Edward Welch, said claim being designated in the entry and purchase as "mineral lot No. 86." Thereafter, pursuant to such entry and purchase, patent of the United States issued for said mineral lot No. 86 to said F. T. Sutherland, Hugh McCaffrey, Henry Suessenbach, and the heirs of Edward Welch, which patent bears date February 15, 1882, and was filed for record August 21, 1882, and recorded in Book No. 20, page 15, of the records of the register of deeds' office in said Lawrence

county, the said F. T. Sutherland, patentee, being the same F. T. Sutherland, one of the purchasers of said placer claim from Siever, Durham, Moore, and Clifton; that on the 16th day of July, 1878, said F. T. Sutherland sold and conveyed all his right, title, and interest in and to said placer claim No. 15 to Hugh McCaffrey and Henry Suessenbach by deed of that date, filed for record July 21, 1882, and recorded in Book No. 20, page 428, of the records of said register of deeds' office; that on or about the 5th day of August, 1882, the heirs of Edward Welch, to wit, Samuel Welch, Mary Welch, Lydia Welch, and Mary Franklin, sold and conveyed all their interest in said placer claim No. 15 to Henry Suessenbach by deed of that date, filed for record August 5, 1882, and recorded in Book No. 26, page 75, of the records of said office; that on or about August 10, 1882, Henry Suessenbach and Hugh McCaffrey sold to Daniel McLaughlin and William R. Steele, by deed of that date, an undivided one-fourth interest in and to certain portions of said mineral lot No. 86, including the premises in dispute; that the ground claimed by the defendant under the chain of title set out in this statement of facts is identical with that described in the complaint and claimed by the plaintiffs as a part of mineral lot No. 86; that the defendant has occupied the said lot continuously since its organization, in 1878, up to this time; that on September 26, 1879, the building thereon erected by the said Durham, Moore, Hamilton, and Scott, and sold, with the lot, to the said Stebbins and Hoffman, was destroyed by fire, and thereupon the defendant immediately re-erected on the same ground and had finished and ready for occupancy January, 1880, a two-story brick building 21 by 70 feet, of the value of $10,000, which since January 1, 1880, has been continuously occupied by the defendant as a bank and for offices; that at the time of each and every of the conveyances to the plaintiffs they, the plaintiffs, had full notice and knowledge of the claim of title by the said Stebbins and Hoffman and by the defendant bank; that the respondent has been at all times ready and willing and is now ready and willing to pay its just and full proportion of all the expenses attending the procuring of the patent from the United States; that the title acquired by the plaintiffs under the patent from the United States came to them through the location of said placer claim No. 15 made by the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton March 16, 1877, no other location of said placer claim No. 15 having been made by the said plaintiffs or their grantors or any of them.

The foregoing facts are sustained by the evidence, with the exception of the finding that Sutherland, Lake, and Sutherland agreed with Noah Siever and his associates to protect and respect the title and possession of Stebbins and Hoffman. We are of the opinion, however, that it was not necessary for the trial court to find that there was such an agreement in order to sustain the judgment which it rendered. The appellants, at the argument, insisted upon four principal points for a reversal of the judgment: (1) That the respondent, or its grantors, never obtained any interest in the prem-

ises in controversy, for the reason that at the time of the
256 alleged transfer by the original locators of placer claim No. 15 above discovery the title to said land and premises was in the United States; (2) that, admitting that respondent, through its grantors, obtained an interest in said mining claim, the said interest had been lost by failure to adverse the claim of appellants' grantors when they applied through the United States land office for a patent for said mining claim; (3) that the court erred in admitting in evidence the transcript of the proceedings had in the United States land office when the appellants' grantors applied for a patent, and also in admitting in evidence the mining rules and regulations of Whitewood mining district; (4) that the court erred in discharging the jury from the case.

It is now believed to be the settled law that a mining claim, concerning which all the laws, rules, regulations, and customs governing the same have been complied with, is property and capable of being transferred, mortgaged, and inherited. In Forbes *v.* Gracey, 94 U. S., 766, the validity of the law of the State of Nevada providing for the taxation of mining claims was in question. It was insisted against the validity of the law that it was an attempt by the State of Nevada to tax the property of the United States. Justice Miller, in delivering the opinion of the court holding such a law valid, said: "In the latter, also, such right as the mining laws allow and as Congress concedes to develop and work the mines is property in the miner, and property of great value. That it is so is shown most clearly by the conduct of the mining corporation in whose interest this suit is brought, which, for the purpose of evading this tax, permits its investment in this mine, said to be worth from fifty to a hundred millions of dollars, to rest on this claim, this mere possessory right, when it could, at a ridiculously small sum compared with the value of the mine, obtain the Government's title to the entire land, soil, mineral, and all. These claims are the subject of bargain and sale and constitute very largely the wealth of the Pacific coast States. They are property in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined code or codes of law and are recognized by the States and the Federal Government. This claim may be sold, transferred, mortgaged, and inherited without infringing the title of the United States." See also Belk. *v.* Meagher, 104 U. S., 279, where it is said that "a mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed and will pass by descent." The language of the court in the case of Noyes *v.* Mantle, 127 U. S., 351, 8 Sup. Ct. Rep., 1132, is so applicable to this case and the point under consideration that we cannot do better than to quote therefrom. The court says: "Section 2322 of the Revised Statutes, re-enacting the provisions of the act of Congress of May 10, 1872 (17 St., 91), declares that the locators of mining locations previously made or which should thereafter be made on any mineral vein, lode, or ledge on the public domain, their heirs and assigns, where no adverse claim existed on the 10th of May, 1872, shall have the exclusive right of

possession and enjoyment of all the surface included within the lines of their locations so long as they comply with the laws of the United States and with State, territorial, and local regulations not in conflict with those laws governing their possessory title. There is no pretense in this case that the original locators did not comply with all the requirements of the law in making the location of the Pay Streak Lode mining claim, or that the claim was ever abandoned or forfeited. They were the discoverers of the claim. They marked its boundaries by stakes, so that they could be readily traced. They posted the required notice, which was duly recorded in compliance with the regulations of the district. They had thus done all that was necessary under the law for the acquisition of an exclusive right to the possession and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim and of subsequent expenditures to a specified amount in developing it. Until the patent issued the Government held the title in trust for the locators or their vendees." It may be proper here to say that by section 2329, Rev. St. U. S., placer mining claims are subject to entry and patent under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims. That the mining location of Siever, Durham, Moore, and Clifton on placer claim No. 15 was a valid one is not disputed in the case at bar, nor could it be, except by the United States, for the reason that it was the location which resulted in the issuance of the patent through which both the appellants and respondent deraign their title. The certificate signed by Welch, Sutherland, McCaffrey, and Suessenbach and filed in the office of the register of deeds of Lawrence county on January 29, 1878, was not a relocation of placer claim No. 15 above discovery, but was, as its language imports, an amended certificate "for the purpose of more clearly defining the boundaries" of said claim. It will not do for the appellants to say that they claim under a patent of the United States and not under the original location. If the United States, prior to the issuance of the patent for placer claim No. 15, held the legal title of said claim in trust for the original locators and their vendees, then the legal title to a portion of said mining claim was held in trust by the United States for the grantors of the respondent and their vendees. The entry at the United States land office and the patent issued in pursuance thereof was burdened with this trust, and the same may be enforced against any person
257 claiming under the patent who can be charged with notice of it. It is further objected that the respondent and its grantors, subsequent to the transfer of the premises in controversy from Siever, Durham, Moore, and Clifton, and Siever, Durham, Hamilton, and Scott, did not improve the premises in question, as required by the laws and customs regulating improvements on mining claims. This objection cannot be urged, as the respondent does not pretend that its rights rest upon the fact that it and its grantors have made the premises in controversy an independent

mining claim, but that it is the owner of said placer claim No. 15 to the extent of the premises in controversy, and that the fact as to whether or not the laws, regulations, and customs were complied with in relation to placer claim No. 15, of which the premises in question were a part, has been settled by the issuance by the United States of a patent for said claim. We are therefore of the opinion that by the conveyances set forth in the findings and the possession delivered thereunder Stebbins and Hoffman and their vendee, the respondent, obtained an interest in said placer claim No. 15 above discovery co-extensive with the premises in controversy, the legal title to which was held in trust by the United States for the benefit of the grantors of respondent and their vendees, and that, the appellants and their grantors having notice of the title and possession of respondent and its grantors, said trust may be enforced against them, providing there is no other legal impediment.

The point most strenuously urged at the argument and which is insisted by appellants to be fatal to the rights of the respondent, if any existed, was the point that the respondent had lost its interest in placer claim No. 15 above discovery by the failure of William R. Stebbins to file an adverse claim in the local United States land office at the time that Sutherland, McCaffrey, Suessenbach, and Welch entered placer claim No. 15 for patent. Among the various requirements of the laws of the United States regulating the mode of entering a mineral claim is one which requires that a notice that the application has been made to enter the land shall be published for the period of 60 days in a newspaper to be designated by the register of the land office as being nearest such claim. The law also provides (section 2325, Rev. St. U. S.): "If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists, and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." It is further provided (section 2326, Rev. St. U. S.) that "where an adverse claim is filed during the period of publication it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim and all proceedings except the publication of notice, and making and filing of the affidavit thereof shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of his adverse claim." We are of the opinion that to hold that the interest of respondent's grantor was an adverse claim within the meaning of the law above quoted would be to wholly misconceive the relation existing between the applicants for

the patent and the grantor of the respondent, William R. Stebbins. The claim of William R. Stebbins to portion of placer claim No. 15, being traced to and from the same location upon which the right of the applicants for a patent rested, was not an adverse claim. It was a portion of the possessory title by which the applicants sought to obtain a patent for placer claim No. 15. Stebbins could get no legal title to the portion of the said claim except through a patent from the United States based upon the original location of Siever, Durham, Moore, and Clifton. He was, therefore, interested in having the patent issue, and had a right to rely upon the record title of the claim being truly presented to the authorities having charge of the issuance of said patent. This, it appears, was not done. The abstract of the record title to said claim as furnished to the officers of the land office wholly omitted the record concerning the premises in controversy, and, whether said omission was intentional or not, it was a fraud committed upon the United States and William R. Stebbins, and it is fair to presume that had the abstract furnished by the applicants shown the true state of the title to said placer claim that William R. Stebbins would have been one of the grantees in the patent. It may be said also that Stebbins, having succeeded to the interest of his grantors, furnished a portion of the consideration for which the patent was issued. The bill of sale from Siever, Durham, Moore, and Clifton did not and could not convey the interest that they had previously conveyed to Stebbins and Hoffman, for the reason that they could not convey more than they owned. No parallel case was cited to the court at the argument upon the point now under consideration, but since the argument the case of Hunt *v.* Patchin, 35 Fed. Rep., 816, decided by the circuit court for the district of Nevada, has been reported. In that case Hunt filed a bill in equity to establish a trust in three mining claims in favor of himself and to compel a conveyance to himself of such an interest therein as he
258 might establish. The facts in the case were as follows: Hunt and Patchin were joint owners of three mining claims in Nevada, and, finding it inconvenient to raise money sufficient to pay the taxes and perform the necessary work to prevent a forfeiture, determined to relocate said claims. The relocation was made, but in the name of Patchin alone. The court found that it was understood, at least by Hunt, that although the relocation was made in Patchin's name the location was for the benefit of both, and that Hunt furnished part of the money required to pay the expense of obtaining the patent. Patchin produced and obtained patent for the mining claims in his own name. Sawyer, C. J., in disposing of the point made by the defendant that Hunt had lost any right he had by failure to adverse the application of Patchin for a patent, said: "But one other point has sufficient plausibility to require notice. After this bill was filed defendant applied to enter the land as mining ground, advertised in pursuance of the statute, and, no protest having been made, in due time he paid the purchase-money and a certificate of entry was issued to him. It is now insisted that, as complainant did not protest and then bring suit to establish his right within the time prescribed by statute, he waived all adverse

claim and the entry is conclusive. But it was on this very title, which defendant in part holds in trust, that he obtained his certificate of entry. In was on these relocations which defendant held in trust that he proceeded, and the entry gives effect to the relocation with the trust attached. This suit was pending at the time of the application for purchase to establish, not the legal title, but a trust in it. This claim by complainant of a trust was not adverse to the possessory title upon which the entry was made, but a part of that title, and the trust which had attached before the entry followed the title upon the entry based upon the possessory title of which it was a part. The complainant is entitled to the benefit of this entry to the extent of the trust." We think that the reasoning of the learned judge may be applied to the case at bar, and therefore conclude that the claim of Stebbins was not adverse within the meaning of the law. The admission of the mining rules of Whitewood mining district, and also the transcript of the proceedings had in the land office when the application was made to enter placer claim No. 15 in evidence, was not error, as they were not introduced for the purpose of impeaching the patent, but to show that the legal title had not by reason of accident, fraud, or mistake passed to the true owners, and the fact that respondent, in order to establish his right to have the legal title of the premises in question controlled for his benefit, had to introduce the same evidence that was introduced by the applicants when the land was entered for patent is another strong reason why the claim of Stebbins was not an adverse claim. Actions under the system of pleading prevailing in the code States, and bills in equity where the chancery jurisdiction is separately exercised for the purpose of establishing trusts in patented land, are now of common occurrence in the States and Territories where the public land is being disposed of by the United States, and the principle invoked to establish such trust was well known to the common law in equity jurisprudence and is plainly expressed in section 1297 of our Civil Code, which reads as follows: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it." See also Lakin *v.* Mining Co., 25 Fed. Rep., 337. The course pursued by the court in relation to discharging the jury was not error. Under the system of pleading prevailing in this Territory equitable defenses to an action of ejectment may be set up by way of counter-claim, and when so set up they assume the character of a suit in equity, and it is the proper practice for the court to determine the equitable issues first, and, having determined them in favor of respondent, there was nothing for the jury to do. As supporting this mode of proceeding see Dupont *v.* Davis, 35 Wis., 631–639; Ingles *v.* Patterson, 36 Wis., 373–376; Bartlett *v.* Judd, 21 N. Y., 200–203; Pom. Rem., §§ 97, 737, 746, 764, 792; Lombard *v.* Cowham, 34 Wis., 490, 492; Code Civil Proc., § 119, subd. 2; Tabor *v.* Mackkee, 58 Ind., 290; Cavalli *v.* Allen, 57 N. Y., 508, 514; Arguello *v.* Edinger, 10 Cal., 150; Estrada *v.* Murphy, 19 Cal., 248, 272. In conclusion, we think that

the facts as exhibited by the record present a very proper case for equitable relief. No other error appearing, the judgment of the district court must be affirmed.

Supreme court of the Territory of Dakota. Filed Feb. 4, 1889. J. H. C. Young, clerk.

259 In the Supreme Court of Dakota.

HENRY SUESSENBACH, HUGH MCCAFFREY, *et al.*, Appellants,
vs.
FIRST NATIONAL BANK OF DEADWOOD, DAKOTA, Respondents.

Statement of Costs.

Printing brief of respondents	$23 75
On appeal before argument	5 00
On appeal after argument	15 00
Clerk's costs on appeal, unpaid	15 55
	$59 30

It is hereby stipulated that the foregoing costs now be taxed in favor of respondents and inserted in the judgment of affirmance in the above-entitled action in the supreme court.

Deadwood, D. T., March 23, 1889.

McLAUGHLIN & STEELE,
Att'ys for Appellants.
G. C. MOODY, E. VAN CISE,
Att'ys for Respondents.

(Endorsements.)

Supreme Court of the Territory of Dakota.

Filed April 1, 1889.

J. H. C. YOUNG, *Clerk.*

Costs and disbursements taxed and allowed as above at $59.30.
J. H. C. YOUNG, *Clerk.*

Yankton, D. T., April 1, 1889.

260 In Supreme Court, Territory of Dakota, *ss:*

I, James H. C. Young, clerk of the supreme court within and for the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of all the papers filed in the supreme court of the Territory of Dakota in the above-entitled action, wherein Henry Suessenbach, Hugh McCaffrey, Daniel McLaughlin, and William R. Steele are plaintiffs and appellants *versus* The First National Bank of Deadwood, defendant and respondent, as the same now remains of record in said court, together with copies of the journal entries of the supreme court of the Territory of Dakota so far as relates to said case; also

that the citation herewith is the original citation issued by said supreme court of the Territory of Dakota.

In witness whereof I have hereunto set my hand and affixed the seal of the said court this 3d day of May, A. D. 1889.

[Seal Supreme Court of Dakota Territory.]

JAMES H. C. YOUNG, *Clerk.*

Original citation herewith in addition to copy.

261 United States of America to the First National Bank of Deadwood, Dakota:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1889, pursuant to an appeal filed in the clerk's office of the supreme court of the Territory of Dakota, wherein Henry Suessenbach, Hugh McCaffrey, Daniel McLaughlin, and William R. Steele are appellants and you are respondent and appellee, to show cause, if any there be, why the judgment and decree in the said appeal mentioned should not be corrected and speedy justice should — be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3rd day of November, A. D. 1888.

BARTLETT TRIPP,
Chief Justice of the Supreme Court of the Territory of Dakota.

262 [Endorsed:] Citation. Henry Suessenbach *et al. vs.* The First National Bank of Deadwood. Service of a copy of the within citation upon me admitted this 10th day of November, 1888. G. C. Moody, attorney for respondent. Supreme court of the Territory of Dakota. Filed Nov. 24, 1888. J. H. C. Young, clerk.

Endorsed on cover: Case No. 13,606. Dakota Territory supreme court. No. 68. Henry Suessenbach, Hugh McCaffrey, Daniel McLaughlin, and William R. Steele, appellants, *vs.* The First National Bank of Deadwood, Dakota. Filed August 16, 1889.

Transcripts -
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Supreme Court U. States
149 U. S.

~~Supreme Court U. S.~~

~~191~~

784 — 787